

REPORT ON SALE OF GOODS

ONTARIO LAW REFORM COMMISSION

VOLUME III

APPENDICES



**REPORT
ON
SALE OF GOODS**

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APPENDICES



**Ministry of the
Attorney
General**

1979

The Ontario Law Reform Commission was established by section 1 of *The Ontario Law Reform Commission Act* to further the reform of the law, legal procedures and legal institutions. The Commissioners are:

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VOLUME III

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APPENDIX 1

DRAFT BILL

being a Bill introducing

A REVISED SALE OF GOODS ACT*

*For purposes of convenience we have adopted the decimal system in numbering the Draft Bill. It is anticipated that, when the Bill is introduced in the Legislature, it will be renumbered consecutively in traditional Ontario drafting style.



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NSW Draft Bill	—	New South Wales Law Reform Commission, <i>Working Paper on the Sale of Goods</i> (1975), Draft Bill
SGA	—	<i>The Sale of Goods Act</i> (Ontario), R.S.O. 1970, c. 421
PPSA	—	<i>The Personal Property Security Act</i> (Ontario) R.S.O. 1970, c. 344 as am.
Restatement	—	American Law Institute, <i>Restatement of the Law of Contracts</i> (1932)
Restatement (Tent. Draft)	—	American Law Institute, <i>Restatement of the Law, Contracts 2d</i> , Tent. Draft
UCC	—	<i>Uniform Commercial Code</i> (1972 Official Text)
UK SGA	—	<i>The Sale of Goods Act 1893</i> , 56 and 57 Vict., c. 71 (U.K.), as amended by the <i>Supply of Goods (Implied Terms) Act 1973</i> , c. 13 (U.K.) and prior to changes effected by the <i>Unfair Contract Terms Act 1977</i> , c. 50 (U.K.)
ULIS	—	Convention Relating to a Uniform Law on the International Sale of Goods (1974)
UNCITRAL	—	United Nations Commission on International Trade Law, Draft Convention on the International Sale of Goods, General Assembly Official Records: 32nd Session, Suppl. No. 17 (A/32/17), New York, 1977
USA	—	<i>Uniform Sales Act</i> , National Conference of Commissioners on Uniform State Laws (American; 1906)

**An Act to Revise
The Sale of Goods Act**

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

PART I

INTERPRETATION

1.1.—(1) In this Act,

Interpretation

1. “action” means a civil proceeding commenced by writ of summons or otherwise, and includes a counterclaim;

Sources: The Judicature Act, R.S.O. 1970, c. 228, s. 1(a); SGA s. 1(1)(a); UCC 1-201(1).

2. “agreement” means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing, usage of trade or course of performance;

Sources: UCC 1-201(3).

3. “bill of lading” means a document evidencing the receipt of goods for shipment by any mode of carriage issued by a person engaged in the business of transporting or forwarding goods;

Sources: UCC 1-201(6).

4. “buyer” means a person who buys or contracts to buy goods;

Sources: UCC 2-103(1)(a).

5. “buyer in the ordinary course of business” means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind for cash or by

R.S.O. 1970
c. 52

exchange of other property or on secured or unsecured credit, and includes a person who receives goods or documents of title under a pre-existing contract of sale, but does not include a person who receives a transfer in bulk within the meaning of *The Bulk Sales Act* or as security for or in total or partial satisfaction of a money debt;

Sources: UCC 1-201(9).

6. "commercial unit" means a unit of goods that by commercial usage is a single whole for the purpose of sale and the division of which would materially impair its character or value on the market or its use, for example, a commercial unit may be a single article (as a machine), a set of articles (as a suite of furniture or an assortment of sizes), a quantity (as a bale, gross, or car-load), or any other unit treated in use or in its market as a single whole;

Sources: UCC 2-105(6).

7. "contract" means the legal obligations that result from the parties' agreement as affected by this Act and any other applicable rules of law;

Sources: UCC 1-201(11).

8. "contract of sale" means a contract whereby the seller transfers or agrees to transfer the title in goods to the buyer for a price, and includes,

- (a) a contract for the supply of goods to be manufactured or produced by the seller whether or not the goods are made to the buyer's order, and without regard to the relative value of the labour and materials involved;
- (b) a contract in which the seller is to retain a security interest in the goods; or
- (c) a contract to which sections 5.12(2) and 5.16 apply;

Sources: SGA s. 2(1); ULIS Art. 6; new.

9. "course of dealing" means previous conduct between the parties to a transaction that may fairly be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct;

Sources: UCC 1-205(1).

10. "delivery" means the voluntary transfer of possession;

Sources: SGA s. 1(d).

11. "document of title" means a writing that,

- (i) purports to be issued by or addressed to a bailee,
- (ii) purports to cover goods in the bailee's possession that are identified or fungible portions of an identified mass, and
- (iii) in the ordinary course of business is treated as establishing that the person in possession of the document of title is, with any necessary endorsement, entitled to receive, hold and dispose of it and the goods it covers;

Sources: PPSA s. 1(i).

12. "fault" means a wrongful act, omission or breach;

Sources: UCC 1-201(16).

13. "financing agency" means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract of sale, as by purchasing or paying the seller's bill of exchange or making advances against it or by merely taking it for collection whether or not documents of title accompany the bill;

Sources: UCC 2-104(2).

14. "fungible goods" means goods of which any one unit is the equivalent of any other unit by nature or by usage of trade or is so treated by agreement or in a document;

Sources: UCC 1-201(17).

15. "good faith" means honesty in fact and the observance of reasonable standards of fair dealing;

Sources: UCC 1-201(19), 2-103(1)(b).

16. "goods" means movable things, and includes the unborn young of animals, growing crops and other things attached to or forming part of land as pro-

vided in section 2.5, but does not include the money in which the price is to be paid or things in action;

Sources: UCC 2-105(1).

17. “insolvent” means a person who has ceased to pay his debts in the ordinary course of business, who cannot pay his debts as they become due, or who is insolvent within the meaning of the *Bankruptcy Act* (Canada);

Sources: UCC 1-201(23).

18. “merchant” means a person,
- (a) who deals in goods of the kind involved in the transaction;
 - (b) who by his occupation holds himself out as having knowledge or skill appropriate to the practices or goods involved in the transaction; or
 - (c) to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill;

Sources: UCC 2-104(1).

19. “notify” means to take such steps as are reasonably required to give information to the person to be notified so that the information,

- (a) comes to his attention; or
- (b) is directed to him at the place of business or residence through which the contract was made or at such other place as is held out by him as the place for receipt of such information,

and “notification” has a corresponding meaning;

Sources: PPSA s. 1(p); UCC 1-201(26).

20. “receipt” of goods means taking physical possession of them, and “to receive” has a corresponding meaning;

Sources: UCC 2-103(1)(c).

21. “security interest” means an interest in personal property, including goods, that secures payment or performance of an obligation;

Sources: PPSA s. 1(y); UCC 1-201(37) (1st sent.).

22. “seller” means a person who sells or contracts to sell goods;

Sources: UCC 2-103(1)(d).

23. “signed” includes the execution or adoption of any symbol by a party to a contract of sale with the present intention of authenticating a writing;

Sources: UCC 1-201(39).

24. “substantial breach” means a breach of contract that the party in breach foresaw or ought reasonably to have foreseen as likely to impair substantially the value of the contract to the other party;

Sources: UCC 2-608, 2-612; UNCITRAL Art. 8.

25. “usage of trade” means any reasonable practice or method of dealing that is observed in a place, vocation or trade with such regularity as to justify an expectation that it will be observed with respect to a transaction in question;

Sources: UCC 1-205(2).

26. “value” means a consideration sufficient to support a simple contract;

Sources: PPSA s. 1(z).

27. “writing” includes any mechanical, electronic or other form of recording of information, and “written” has a corresponding meaning.

Sources: New.

(2) In this Act, in relation to a contract of sale,

- (a) “conforming” means that goods or conduct, including any part of a performance, are in accordance with the obligations under the contract; Meaning of
“conforming”
- (b) “termination” occurs when a party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach and thereupon all executory obligations are discharged but any right based on prior breach or performance “termination”

	survives, and “terminate” has a corresponding meaning;
“cancellation”	(c) “cancellation” occurs when a party puts an end to the contract for breach by the other and its effect is the same as that of “termination” except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed part thereof, and “cancel” has a corresponding meaning;
“reasonable time”	(d) whenever any action is required to be taken within a reasonable time, any time that is not manifestly unreasonable may be fixed by agreement;
Idem	(e) what is a reasonable time for taking any action depends on the nature or purpose of the action and all the other surrounding circumstances;
“seasonably”	(f) an action is taken “seasonably” when it is taken at or within the time agreed or, if no time is agreed, at or within a reasonable time.

Sources: UCC 1-204, 2-106(2),(3),(4).

PART II

SCOPE AND APPLICATION OF ACT

Purposes of Act	<p>2.1. The purposes of this Act are to revise, reform, and modernize the law governing the sale of goods, to promote fair dealing, to assist the continued expansion of commercial practices through custom, usage and agreement of the parties, and to seek greater uniformity with the laws of other jurisdictions.</p> <p>Sources: Canada Business Corporations Act, S.C. 1974-75-76, c. 53, s. 4; UCC 1-102(1).</p>
Application of Act	<p>2.2.—(1) This Act applies to every contract of sale of goods.</p>
Act does not apply to secured transactions	<p>(2) This Act does not apply to any transaction that is intended to operate only as a secured transaction, whether or not it is in the form of an unconditional contract of sale.</p>
What constitutes a contract of sale	<p>(3) Whether or not a contract in the form of a lease of goods, bailment, hire-purchase, consignment or otherwise is a contract of sale depends on the intention of the parties, the substantial effect of the contract and all the other surrounding circumstances.</p>
Act applies to “near sales”	<p>(4) Any of the provisions of this Act, if relevant in principle and appropriate in the circumstances, may be applied</p>

by analogy to a transaction respecting goods other than a contract of sale such as a lease of goods or a contract for the supply of labour and materials.

Sources: SGA s. 57(3); UCC 2-102; new.

2.3. The Crown is bound by this Act.

Crown bound

Sources: New.

2.4.—(1) Goods that are the subject of a contract of sale must be both existing and identified before any interest in them can pass.

Condition of goods before interest can pass

(2) Goods that are not both existing and identified are “future” goods.

“Future” goods

(3) A purported present sale of future goods or of any interest in future goods operates as a contract to sell.

Idem

(4) There may be a sale of a part interest in existing identified goods.

Part interests

(5) An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined, and any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may, to the extent of the seller’s interest in the bulk, be sold to the buyer who then becomes an owner in common.

Fungible goods

Sources: SGA ss. 2(1), 6; UCC 2-105(2),(3),(4).

2.5.—(1) A contract of sale of minerals, hydrocarbons or other substances to be extracted from land is a contract of sale of goods if they are to be severed by the seller, but until severance a purported present sale thereof that is not effective as a transfer of an interest in land is effective only as a contract to sell.

Sale of minerals, etc.

(2) A contract of sale, apart from the land, of growing crops, timber, fixtures or other things attached to the land that are intended to be severed under the contract of sale is a contract for the sale of goods,

Sale of fixtures, etc.

(a) whether the subject matter is to be severed by the buyer or by the seller; and

(b) even though the subject matter forms part of the land at the time of contracting and severance is to be at a later time;

and the parties can by identification effect a present sale before severance.

Rights
of third
parties

(3) The rights of a buyer under subsection 2 are subject to the interest of any person, other than the seller, who had a registered interest in the real property at the time of the contract of sale, and are subject to the interest of,

- (a) a subsequent purchaser or mortgagee for value of an interest in the real property;
- (b) a creditor with a lien on the real property subsequently obtained as a result of judicial process; or
- (c) a creditor with a prior encumbrance of record on the real property in respect of subsequent advances,

if the subsequent purchase or mortgage was made or the lien was obtained or the subsequent advance under the prior encumbrance was made or contracted for, as the case may be, without actual notice of the contract of sale.

(4) A notice in the form prescribed by the regulations may be registered in the proper land registry office and thereupon it shall, for the purposes of subsection 3, constitute actual notice of the buyer's rights under the contract of sale.

Sources: PPSA ss. 36, 54; UCC 2-107.

Price, how
payable

2.6.—(1) The price may be made payable in money or otherwise.

Idem,
goods

(2) Where the price is payable in whole or in part in goods, each party is a seller of the goods that he is to transfer.

Idem,
land

(3) Where the price is payable in whole or in part in an interest in land, this Act applies to the transfer of the goods and to the seller's obligations in connection therewith, but this Act does not apply to the transfer of the interest in land or to the buyer's obligations in connection therewith.

Sources: UCC 2-304.

PART III

GENERAL

Exclusion,
variation
of provi-
sions of
Act

3.1.—(1) Except as otherwise provided in this Act, any provision of this Act may be varied or negated by agreement of the parties.

Standards of
performance of
obligations

(2) The obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by the parties, but they may agree upon the standards by which the performance of such obligations are to be meas-

ured so long as the standards agreed upon are not manifestly unreasonable.

Sources: SGA s. 53; UCC 1-102(3).

3.2. Every right and duty that is created by a contract of sale or by this Act imposes an obligation of good faith in its enforcement or performance whether or not it is expressly so stated.

Obligation of good faith

Sources: UCC 1-203.

3.3. Where any right is conferred or any duty or liability is imposed by this Act, it may, unless otherwise provided by this Act, be enforced by action.

Rights, etc., enforceable by action

Sources: SGA s. 55.

3.4.—(1) Unless inconsistent with this Act, the principles of law and equity, including the law merchant and the law of principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause, supplement the provisions of this Act.

General principles of law applicable

(2) Nothing in this Act affects the rights of a holder in due course of a bill, note or cheque within the meaning of the *Bills of Exchange Act* (Can.), or the rights of a holder of a document of title under federal legislation, or Ontario legislation other than this Act.

R.S.C. 1970, c. B-5, etc.

Sources: SGA s. 57; UCC 1-103; new.

PART IV

FORMATION, ADJUSTMENT AND ASSIGNMENT OF CONTRACTS

4.1.—(1) In this section “necessaries” means goods suitable to the condition in life of the minor or other person and to his actual requirements at the time of delivery of the goods.

Meaning of necessities

(2) Capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property, but where necessities are sold and delivered to a minor or to a person who by reason of mental incapacity, drunkenness or otherwise is incompetent to contract, he must pay a reasonable price therefor.

Capacity to buy and sell

Sources: SGA s. 3.

4.2.—(1) A contract of sale may be made in any manner sufficient to show agreement, including conduct by the parties which recognizes the existence of such a contract.

How contract of sale may be made

Moment of making may be undetermined

(2) An agreement sufficient to constitute a contract of sale may be found even though the moment of its making is undetermined.

Where conduct of parties may establish contract of sale

(3) Conduct by both parties which assumes the existence of a contract is sufficient to establish a contract of sale although the writings or other communications of the parties do not otherwise establish a contract, and in such a case the terms of the contract consist of those terms on which the parties have agreed together with any supplementary terms incorporated under any provision of this Act.

Cure for indefiniteness

(4) Even though one or more terms are left open, a contract of sale does not fail for indefiniteness if the parties intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

Sources: UCC 2-204, 2-207(3).

Firm offers

4.3. An offer by a merchant to buy or sell goods which expressly provides that it will be held open is not revocable for lack of consideration during the time stated or, if no time is stated, for a reasonable time not to exceed three months.

Sources: UCC 2-205; new.

Forms of acceptance

4.4.—(1) Unless otherwise indicated by the language or the circumstances,

(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances including performance of a requested act; and

(b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

Acceptance by tender or beginning of performance

(2) Where an offer invites an offeree to choose between acceptance by promise and acceptance by performance,

(a) the tender or beginning of the invited performance or a tender of a beginning of it is an acceptance by performance; and

(b) such an acceptance operates as a promise to render complete performance.

(3) If an offeree who accepts by performance has reason to know that the offeror has no adequate means of learning of the performance with reasonable promptness and certainty, the contractual duty of the offeror is discharged unless,

Duty to
notify
of acceptance
by performance

- (a) the offeree exercises reasonable diligence to notify the offeror of acceptance;
- (b) the offeror learns of the performance within a reasonable time; or
- (c) the offer indicates that notification of acceptance is not required.

Sources: Restatement (Tent. Draft) ss. 29, 56(2), 63; UCC 2-206.

4.5.—(1) Where goods are put up for sale by auction in lots, each lot is the subject of a separate sale.

Sales by
auction:
lots

(2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in any other customary manner.

When auction
sale complete

(3) A sale by auction is with reserve unless the goods are put up without reserve.

Reserve bids

(4) In an auction with reserve, the auctioneer may withdraw the goods at any time until he announces completion of the sale.

Auctions
with reserve

(5) In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time.

Auctions with-
out reserve

(6) In an auction with or without reserve the bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

Bidder's right
to retract bid

(7) A right to bid may be reserved expressly by or on behalf of the seller.

Seller's right
to bid

(8) Where a seller has not reserved the right to bid, it is not lawful, except in the case of a forced sale, for the seller to bid himself or to employ a person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person.

Wrongful bid
by seller

(9) Where subsection 8 is contravened, the buyer may treat the sale as fraudulent and may avoid the sale and recover damages, or may affirm the sale and recover damages or claim an abatement in the price.

Conse-
quences

Sources: SGA s. 56; UCC 2-328.

Parol evidence
rule not
applicable

4.6. The parol evidence rule does not apply to contracts for the sale of goods and a provision in a writing purporting to state that the writing represents the exclusive expression of the parties' agreement has no conclusive effect.

Sources: New.

Course of deal-
ing and usage
of trade

4.7.—(1) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify the terms of an agreement.

Place of
performance

(2) An applicable usage of trade in the place where any part of performance is to occur may be used in interpreting the agreement as to that part of the performance.

Course of
performance

(3) Where an agreement of sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is relevant in determining the meaning of the agreement.

Relationship of
express terms,
course of
performance,
course of
dealing and
usage of trade

(4) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, the express terms of the agreement control the course of performance, the course of performance controls both the course of dealing and the usage of trade, and the course of dealing controls the usage of trade.

Course of
performance
as waiver or
modification

(5) Subject to section 4.8, such course of performance is relevant to show a waiver or modification of any term inconsistent with such course of performance.

Sources: UCC 1-205(3),(4), 2-208.

Modification
of contract
of sale

4.8.—(1) An agreement in good faith modifying a contract of sale needs no consideration to be binding.

Modification
of rescission
excluded

(2) An agreement that excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded but, except as between merchants, such a requirement on a form supplied by the merchant must be separately signed by the other party.

Waiver

(3) An attempt at modification or rescission that does not satisfy the requirements of subsection 2 may operate as a waiver or equitable estoppel.

Retraction
of waiver

(4) A party who has waived compliance with an executory portion of a contract may retract the waiver by reasonable

notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

Sources: UCC 2-209.

4.9.—(1) A party to a contract of sale may perform his duty under it through a delegate unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract, but a delegation of performance does not relieve the party delegating of any duty to perform or of any liability for breach.

Delegation of performance

(2) The rights of a seller or buyer may be assigned except where the assignment would,

Assignment of rights

- (a) change materially the duty of the other party;
- (b) increase materially the burden or risk imposed on the other party by the contract; or
- (c) impair materially the other party's chance of obtaining return performance.

(3) A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation may be assigned despite contrary agreement.

Idem

(4) Unless the circumstances indicate the contrary, a term prohibiting assignment of a contract shall be construed as barring only the delegation to the assignee of the assignor's duty of performance.

Construction of term prohibiting assignment

(5) An assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is,

Assignments in general terms

- (a) an assignment of rights; and
- (b) unless the language or the circumstances indicate the contrary, a delegation of performance of the duties of the assignor.

(6) The acceptance by the assignee of an assignment under subsection 5 constitutes a promise by him to perform the duties of the assignor and this promise is enforceable by either the assignor or the other party to the original contract.

Acceptance of assignment by assignee

(7) The other party may treat an assignment that delegates performance as creating reasonable grounds for insecurity and he may, without prejudice to his rights against the assignor, demand assurances of performance from the assignee.

Application of sec. 8.9

Sources: UCC 2-210.

PART V

GENERAL OBLIGATIONS AND CONSTRUCTION OF CONTRACT

General obligations of the parties

5.1.—(1) It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract of sale.

Meaning of buyer's obligation to pay extended

(2) The buyer's obligation to pay includes taking such steps and complying with such formalities as are required under the contract and any relevant law to enable payment to be made or to ensure that it will be made.

Sources: SGA s. 26; UNCITRAL Arts. 14, 35, 36.

Unconscionable contracts or parts of contracts

5.2.—(1) If, with respect to a contract of sale, the court finds the contract or a part thereof to have been unconscionable at the time it was made, the court may,

- (a) refuse to enforce the contract or rescind it on such terms as may be just;
- (b) enforce the remainder of the contract without the unconscionable part; or
- (c) so limit the application of any unconscionable part or revise or alter the contract as to avoid any unconscionable result.

Factors to be considered in determining unconscionability

(2) In determining whether a contract of sale or a part thereof is unconscionable, or whether the operation of an agreement is unconscionable under section 5.7(3), the court may consider, among other factors:

- (a) the degree to which one party has taken advantage of the inability of the other party reasonably to protect his interests because of his physical or mental infirmity, illiteracy, inability to understand the language of an agreement, lack of education, lack of business knowledge or experience, financial distress, or similar factors;
- (b) gross disparity between the price of the goods and the price at which similar goods could be readily sold or purchased by parties in similar circumstances;
- (c) knowledge by one party, when entering into the contract, that the other party will be substantially deprived of the benefit or benefits reasonably anticipated by that other party under the transaction;
- (d) the degree to which the contract requires a party to waive rights to which he would otherwise be entitled;

- (e) the degree to which the natural effect of the transaction, or any party's conduct prior to, or at the time of, the transaction, is to cause or aid in causing another party to misunderstand the true nature of the transaction and of his rights and duties thereunder;
 - (f) the bargaining strength of the seller and the buyer relative to each other, taking into account the availability of reasonable alternative sources of supply or demand;
 - (g) whether the party seeking relief knew or ought reasonably to have known of the existence and extent of the term or terms alleged to be unconscionable;
 - (h) in the case of a provision that purports to exclude or limit a liability that would otherwise attach to the party seeking to rely on it, which party is better able to safeguard himself against loss or damages; and
 - (i) the general commercial setting, purpose and effect of the contract.
- (3) The court shall not make a finding of unconscionability based solely upon,
- (a) the factor mentioned in clause *d* of subsection 2; or
 - (b) the fact that the contract varies or excludes a provision of this Act or other legal rights.
- (4) The court may raise the issue of unconscionability of its own motion.
- (5) The powers conferred by this section apply notwithstanding any agreement or waiver to the contrary.
- Sources:* The Business Practices Act, S.O. 1974, c. 131, ss. 2(b), 4(8); UCC 2-302; UK SGA s. 55(5).
- 5.3.—**(1) If the parties so intend, they may conclude a contract of sale even though the price is not settled.
- (2) In such a case the price is a reasonable price at the time for delivery if,
- (a) nothing is said as to price;
 - (b) the price is left to be agreed by the parties or a third person and they fail to agree or the third person fails to fix the price; or
 - (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a

Finding of unconscionability not proper

Power of court

Application of section

Open price

Where reasonable price applies

third person or agency and it is not so set or recorded.

Where party to fix price

(3) Where the price is to be fixed by a party, he must do so in good faith.

Where there is failure to fix a price

(4) Where the price left to be fixed otherwise than by agreement of the parties fails to be fixed through the fault of one party, the other party may treat the contract as cancelled or may himself fix a reasonable price.

Where no price fixed

(5) Where the parties intend not to be bound unless the price is fixed or agreed and it is not fixed or agreed, there is no contract, and in such a case the buyer must return any goods already received or, if he is unable so to do, he must pay their reasonable value at the time of delivery and the seller must return any part of the price paid on account.

Sources: UCC 2-305.

Output and requirements agreements

5.4.—(1) An agreement that measures the quantity of goods to be bought or sold by the output of the seller or the requirements of the buyer means such reasonable quantity as may be required or supplied by the buyer or seller acting in good faith, having regard to any stated estimates, any previous output or requirements, and all the circumstances of the case.

Exclusive dealing agreements

(2) Where the buyer lawfully agrees to buy goods exclusively from the seller or the seller lawfully agrees to sell goods exclusively to the buyer, there is, unless the circumstances show a contrary intention, an obligation by the seller to use his best efforts to supply the goods and by the buyer to use his best efforts to promote their sale.

Sources: UCC 2-306.

Delivery in single lot or in lots

5.5. All goods called for by a contract of sale must be tendered in a single delivery and payment is due only on such tender, but where the circumstances give either party the right to make or demand delivery in lots, payment, if the price can be apportioned, may be demanded for each lot.

Sources: SGA s. 30(1); UCC 2-307.

Place for delivery of goods

5.6.—(1) The place for delivery of goods under a contract of sale is governed by the following rules:

1. If the seller has only one place of business, it is the place for delivery.
2. If the seller has two or more places of business only one of which is known to the buyer, that one is the place for delivery.

3. If the seller has two or more places of business and the buyer knows two or more of them, the one at or from which the seller conducted the negotiations for the sale is the place for delivery.
4. If the seller has no place of business, his residence is the place for delivery.
5. If the seller has no place of business and two or more residences only one of which is known to the buyer, that one is the place for delivery.
6. If the seller has no place of business and two or more residences and the buyer knows two or more of them, the one at or from which the seller conducted the negotiations for the sale is the place for delivery.
7. Where in a contract of sale of identified or unascertained goods the parties knew at the time of contracting that the goods were or were to be drawn from bulk or manufactured or produced at a particular place, that place is the place for delivery.

(2) Documents of title may be delivered through customary banking channels.

Delivery of documents of title

Sources: SGA s. 28(1); UCC 2-308; UNCITRAL Art. 15(b); new.

5.7.—(1) Except where otherwise provided in this Act, any action that is required to be taken by either party under a contract of sale must be taken within a reasonable time.

Action to be taken within reasonable time

(2) Subject to subsection 3, a contract of sale that provides for successive performances over an indefinite period of time may be terminated by either party at any time.

Successive performances

(3) Except where such a contract of sale terminates upon the happening of an agreed event, it may be terminated only if the terminating party gives the other party reasonable notification thereof and an agreement dispensing with such notification is invalid if its operation would be unconscionable.

Where notice of termination required

Sources: SGA s. 28(2); UCC 2-309.

5.8.—(1) Payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery.

When and where payment due

(2) Where the seller is authorized to send the goods, he may ship them under reservation and may tender the documents of title, but the buyer may inspect the goods after the arrival before payment is due.

Idem

Idem

(3) Where delivery is authorized and made by way of documents of title otherwise than under subsection 2, payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received.

When goods shipped on credit

(4) Where the seller is required or authorized to ship the goods on credit, the credit period runs from the time of shipment but post-dating the invoice or delaying its dispatch correspondingly delays the starting of the credit period.

Sources: UCC 2-310.

Where particulars of performance left open

5.9.—(1) An agreement of sale that is otherwise sufficiently definite to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties, but any such specification must be made in good faith and within limits set by commercial reasonableness.

Specifications relating to assortment of goods and shipment

(2) Specifications relating to assortment of the goods are at the buyer's option and, except as otherwise provided in this Act, specifications or arrangements relating to shipment are at the seller's option.

Effect of failure to cooperate

(3) Where a specification mentioned in subsection 2 would materially affect the other party's performance but is not seasonably made, or, where one party's cooperation is necessary to the agreed performance of the other but is not seasonably forthcoming, the other party, in addition to all other remedies,

(a) is excused for any resulting delay in his own performance; and

(b) may, subject to sections 8.10, 8.11 and 9.5, proceed to perform in any reasonable manner.

Sources: UCC 2-311.

Express warranties by seller, etc.

5.10.—(1) A representation or promise in any form relating to goods that are the subject of a contract of sale made by the seller, manufacturer or distributor of the goods is an express warranty and binding upon the person making it,

(a) if the natural tendency of such representation or promise is to induce the buyer, or buyers generally if the representation or promise is made to the public, to rely thereon; and

(b) if, in the case of a representation or promise not made to the public, the buyer acts in reliance upon the representation or promise.

(2) Subsection 1 applies to a representation or promise made before or at the time the contract was made and whether or not, Irrelevant factors

- (a) it was made fraudulently or negligently;
- (b) there is privity of contract between the person making the representation or promise and the buyer;
- (c) it was made with a contractual intention; or
- (d) any consideration was given in respect of it.

(3) This section applies *mutatis mutandis* to a representation or promise made by the buyer. Express warranties by buyer

Sources: NSW Draft Bill ss. 5(5) (part), 15; USA 12; new.

5.11.—(1) Without restricting the generality of section 5.10, Sale by description or sample

- (a) in a contract of sale there is an express warranty that the goods to be supplied will conform to their description in the contract; and
- (b) in a contract of sale by sample or model there is an express warranty that the goods to be supplied will conform to their description in the contract and to the sample or model in all respects including quality.

(2) A sale of goods shall not be prevented from being a sale by description by reason only that, being exposed for sale, they are selected by the buyer. Selection of goods by buyer

(3) Subject to section 5.13, a description of the goods given by a third person is binding on the seller only if by his words or conduct he has adopted the description as his own. When goods described by third person

Sources: NSW Draft Bill s. 16; SGA ss. 14, 16; UCC 2-213(b), (c); UK SGA s. 13(2).

5.12.—(1) In a contract of sale, other than a contract to which subsection 2 applies, there is an implied warranty by the seller, Implied warranty of title

- (a) that in the case of a present sale he has a right to sell the goods and that in the case of a contract to sell he will have a right to sell the goods at the time when the title is to pass;
- (b) that the goods will be delivered free from any security interest or other lien or encumbrance not disclosed or known to the buyer before the contract was made; and

- (c) that the buyer will be entitled to quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any security interest or lien or encumbrance so disclosed or known.

Qualified
title

(2) Where there appears from the contract or is to be inferred from the circumstances of the contract an intention that the seller will transfer only such title as he or a third person may have, there is an implied warranty by the seller,

- (a) that all defects in title and all security interests and other liens and encumbrances known to the seller and not known to the buyer were disclosed to the buyer before the contract was made; and

(b) that

- (i) the seller, or
- (ii) in a case where the parties to the contract intend that the seller will transfer only such title as a third person may have, the third person, or
- (iii) any person claiming through or under the seller or the third person otherwise than under a security interest or other lien or encumbrance disclosed or known to the buyer before the contract was made,

will not disturb the buyer's quiet possession of the goods.

Idem, where
seller retains
a security
interest

(3) Where the seller retains a security interest in the goods, his implied warranty of title takes effect when the goods are delivered to the buyer.

Sources: UK SGA s. 12; UCC 2-312; new.

Meaning of
"merchantable
quality"

5.13.—(1) In this section "merchantable quality" means,

- (a) that the goods, whether new or used, are as fit for the one or more purposes for which goods of that kind are commonly bought and are of such quality and in such condition as it is reasonable to expect having regard to any description applied to them, the price, and all other relevant circumstances;

and, without limiting the generality of clause a,

- (b) that the goods,

- (i) are such as pass without objection in the trade under the contract description,
 - (ii) in the case of fungible goods, are of fair average quality within the description,
 - (iii) within the variations permitted by the agreement, are of even kind, quality and quantity within each unit and among all units involved,
 - (iv) are adequately contained, packaged and labeled as the nature of the goods or the agreement require,
 - (v) conform to the representations or promises made on the container or label or other material, if any, accompanying the goods, and
 - (vi) will remain fit or perform satisfactorily, as the case may be, for a reasonable length of time having regard to all the circumstances; and
- (c) in the case of new goods, unless the circumstances indicate otherwise, that spare parts and repair facilities, if relevant, will be available for a reasonable period of time.
- (2) Where the seller is a person who deals in goods of the kind supplied under the contract, there is an implied warranty that the goods are of merchantable quality. Implied warranty of merchantability
- (3) The implied warranty of merchantable quality does not apply, Exceptions
- (a) as regards defects specifically drawn to the buyer's attention before the contract was made;
 - (b) if the buyer examined the goods before the contract was made, with respect to any defect that such an examination ought to have revealed; or,
 - (c) in the case of a sale by sample or model, with respect to any defect that would have been apparent on reasonable examination of the sample or model.

Sources: NSW Draft Bill ss. 19, 20A; Ontario Bill 110, 3rd Sess., 30th Leg., ss. 4(a), 5; SGA ss. 15(2), 16(2)(c); UCC 2-314(1), (2); UK SGA ss. 14(2), 62(1A); new.

5.14.—(1) Where the buyer, expressly or impliedly, makes known to the seller any particular purpose for which he is buying the goods and the seller deals in goods of that kind, Implied warranty of fitness

there is an implied warranty that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which goods of that kind are commonly supplied.

Exception

(2) The implied warranty mentioned in subsection 1 does not apply where the circumstances show that the buyer does not rely or that it is unreasonable for him to rely on the seller's skill or judgment.

Sources: UK SGA s. 14(3).

Interpretation

5.15.—(1) In this section “lease” includes hire and “lessor” and “lessee” shall be construed accordingly.

Warranties applicable to goods in contract of work and materials

(2) Sections 5.10 to 5.14 apply to goods supplied under a contract of work and materials.

Idem, lease of goods

(3) Sections 5.10, 5.11, 5.13 and 5.14 apply to a contract for the lease of goods and, in addition, there is an implied warranty by the lessor,

(a) that he has the right to lease the goods; and

(b) that the lessee will have quiet possession of the goods during the period of the lease.

Sources: Law Commission, Working Paper No. 71: Law of Contract, Implied Terms in Contracts for the Supply of Goods (1977), para. 79 at pp. 49-50.

Exclusion and modification of warranties

5.16.—(1) Subject to the provisions of this Act on unconscionability,

(a) a warranty implied under this Act;

(b) the effect of a representation or promise which would otherwise amount to an express warranty; and

(c) the remedies for breach of a warranty,

may be modified, limited or excluded by agreement of the parties.

Exclusions and limitations of damages

(2) An exclusion or limitation of damages for breach of warranty for injury to the person is *prima facie* unconscionable but an exclusion or limitation of damages for economic losses is not *prima facie* unconscionable.

Construction of warranties

(3) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit a warranty shall, where reasonable, be construed as consistent with one another, but, to the extent that such a construction is unreasonable, the negation or limitation has no effect.

(4) Subsections 1, 2 and 3 apply to a representation or promise made by a manufacturer or distributor as provided in subsection 1 of section 5.10, Application of subs. 1, 2, 3

- (a) where the modification, limitation or exclusion comes to the buyer's attention before he acts in reliance upon the representation or promise; or
- (b) where the representation or promise is made to the public, and the buyer may reasonably be expected to learn of the modification, limitation or exclusion before buying the goods or relying upon the representation or promise.

Sources: UCC 2-316(1); new.

5.17.—(1) Express or implied warranties shall be construed as consistent with one another and as cumulative, but if such a construction is unreasonable, the intention of the parties determines which warranty is dominant. Cumulation and conflict of warranties

(2) For the purpose of subsection 1 the following rules apply: Rules

- 1. Exact or technical specifications displace an inconsistent sample or model or general language of description.
- 2. A sample from an existing bulk displaces inconsistent general language of description.
- 3. Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

Sources: UCC 2-317.

***5.18.**—(1) In this section, Interpretation

- (a) "goods" includes goods that have been converted into, incorporated in, or attached to, other goods or that have been incorporated in or attached to land;
- (b) "immediate buyer" means a buyer who buys goods from a prior seller;
- (c) "injury" means injury to the person, damage to property, or any economic loss;
- (d) "prior seller" means a seller who sells goods that are subsequently resold;

*The Commission makes no recommendation concerning the enactment of this section. It has been inserted in the Draft Bill to draw attention to the issue and to stimulate discussion.

(e) “subsequent buyer” means a buyer who buys goods that have previously been sold by a prior seller to an immediate buyer.

Prior seller’s warranty

(2) Without prejudice to a subsequent buyer’s rights under section 5.10, a prior seller’s warranty, express or implied, and any remedies for breach thereof, enure in favour of any subsequent buyer of the goods who suffers injury because of a breach of the warranty.

Subsequent buyer’s rights

(3) A subsequent buyer’s rights under subsection 2 are subject to any defence that would have been available to such prior seller in an action against him for breach of the same warranty by his immediate buyer.

Subsequent buyer’s damages

(4) The measure of damages recoverable by a subsequent buyer for breach of warranty by a prior seller shall be no greater than the damages that the immediate buyer could have recovered from such prior seller if a successful claim had been brought against the immediate buyer by the subsequent buyer for breach of the same warranty and the immediate buyer had made a claim over against the prior seller.

Application of section

(5) This section applies notwithstanding any agreement to the contrary.

Sources: NSW Draft Bill ss. 20H, 20I, 20K, 20L; UCC 2-318; new.

Interpretation

5.19.—(1) In this section and in section 5.23, F.O.B., means “free on board” and F.A.S. means “free alongside”.

Seller’s obligations under F.O.B. term

(2) The term F.O.B. at a named place, even though used only in connection with the stated price, is a delivery term under which,

(a) if the term is F.O.B. the place of shipment, the seller shall at that place ship the goods in the manner provided in section 7.3 and bear the expense and risk of putting them into the possession of the carrier; or,

(b) if the term is F.O.B. the place of destination, the seller shall at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in section 7.2.

Additional obligations

(3) If under subsection 2,

(a) the term is also F.O.B. vessel, car or other mode of carriage, the seller shall in addition, at his own expense and risk, load the goods on board; and

(b) the term is F.O.B. vessel, the buyer shall name the vessel and, in an appropriate case, the seller shall

comply with section 5.23 on the form of bill of lading.

(4) The term F.A.S. vessel at a named port, even though used only in connection with the stated price, is a delivery term under which the seller shall, Idem, F.A.S. vessel

(a) at his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer; and

(b) obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.

(5) In any case falling under subsection 2(a) or subsection 3 or subsection 4, the buyer shall seasonably give any necessary instructions for making delivery, including the loading berth of the vessel, and its name and sailing date. Buyer's duty to give instructions

(6) The seller may, Effect of failure to do so

(a) treat the failure to give any necessary instructions as a failure to cooperate under section 5.9; and

(b) at his option, move the goods in any reasonable manner preparatory to delivery or shipment.

(7) Under the term F.O.B. vessel or F.A.S., the buyer shall make payment against tender of the required documents and the seller shall not tender and the buyer shall not demand delivery of the goods in substitution for the documents. Payment against tender of documents

Sources: UCC 2-319.

5.20.—(1) In this section and in sections 5.21 and 5.23, Interpretation

(a) the term C.I.F. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination;

(b) the term C. & F. or C.F. means that the price for the goods includes cost and freight to the named destination.

(2) Even though used only in connection with the stated price and destination, the term C.I.F. destination or its equivalent requires the seller at his own expense and risk to, Seller's obligation under C.I.F. term

(a) put the goods into the possession of a carrier at the port for shipment and obtain one or more negotiable bills of lading covering the entire transportation to the named destination;

- (b) load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight has been paid or provided for;
- (c) obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern, but the seller may add to the price the amount of the premium for any such war risk insurance;
- (d) prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and
- (e) forward and tender with commercial promptness all the documents in due form and with any endorsement necessary to perfect the buyer's rights.

Idem, C. & F.
term

(3) The term C. & F. or the like has the same effect and imposes upon the seller the same obligations and risks as a C.I.F. term except the obligation as to insurance.

Payment
against tender
of documents

(4) Under the term C.I.F. or C. & F. the buyer shall make payment against tender of the required documents and the seller shall not tender and the buyer shall not demand delivery of the goods in substitution for the documents.

Sources: UCC 2-320.

Seller's duty
under "net
landed weights"
and similar
terms

5.21.—(1) Where under a contract containing the term C.I.F. or C. & F. the price is based on or is to be adjusted according to "net landed weights", "delivered weights", "out turn" quantity or quality or the like, the seller shall reasonably estimate the price and the payment due on tender of the documents required by the contract is the amount so estimated, but after final adjustment of the price a settlement shall be made with commercial promptness.

Risk of
ordinary
deterioration
and the like

(2) A contract under subsection 1 or any warranty of quality or condition of the goods on arrival places upon the seller the risk of ordinary deterioration, shrinkage and the like in transportation but has no effect on the place or time of identification to the contract of sale or delivery or on the passing of the risk of loss.

Inspection
before payment

(3) Where the contract provides for payment on or after arrival of the goods the seller shall before payment allow such preliminary inspection as is feasible, but, if the goods are lost,

delivery of the documents and payment are due when the goods should have arrived.

Sources: UCC 2-321.

5.22.—(1) A term in a contract for delivery of goods “ex-ship” or the like is not restricted to a particular ship and requires delivery from a ship which has reached a place at the named port of destination where goods of the kind are usually discharged.

Delivery
“ex-ship”

(2) Under the term “ex-ship” or the like,

Seller’s duties
under

- (a) the seller shall discharge all liens arising out of the carriage and furnish the buyer with a direction which puts the carrier under a duty to deliver the goods; and
- (b) the risk of loss does not pass to the buyer until the goods leave the ship’s tackle or are otherwise properly unloaded.

Sources: UCC 2-322.

5.23.—(1) Where a contract of sale contemplates overseas shipment and contains a term C.I.F. or C. & F. or F.O.B. vessel, the seller shall obtain a negotiable bill of lading stating that the goods have been loaded on board or, in the case of the term C.I.F. or C. & F., received for shipment.

Overseas
shipment:
form of bill
of lading

(2) Where in a case within subsection 1 a bill of lading has been issued in a set of parts, the buyer may demand tender of the full set of documents unless they are to be sent from abroad, in which case only one part of the bill of lading is required to be tendered and even if the agreement stipulates a full set of documents, the person tendering an incomplete set may require payment upon furnishing an adequate indemnity.

Idem, tender of
bill of lading
in parts

(3) For the purposes of this section, a shipment by water or by air or a contract contemplating such a shipment is “overseas” insofar as by usage of trade or agreement it is subject to the commercial, financing or shipping practices characteristic of international deep-water commerce.

Shipments
by air or
water

Sources: UCC 2-323.

5.24. Under the term “no arrival, no sale” or the like,

“No arrival,
no sale” terms

- (a) the seller shall properly ship conforming goods and, if they arrive by any means, he shall tender them on arrival but he assumes no obligation that the goods will arrive unless he has caused the non-arrival; and

- (b) where, without fault of the seller, the goods are in part lost or have so deteriorated as no longer to conform to the contract or arrive after the contract time, the buyer may proceed as if there had been casualty to identified goods.

Sources: UCC 2-324.

Meaning of
letter of credit,
banker's credit,
confirmed
credit

5.25.—(1) In a contract of sale,

- (a) "letter of credit" or "banker's credit" means an irrevocable credit issued by a financing agency of good repute and, where the shipment is overseas, of good international repute;
- (b) "confirmed credit" means that the credit mentioned in clause *a* also carries the direct obligation of an agency of the kind mentioned in clause *a* that does business in the seller's financial market.

Letter of
credit

- (2) Failure of the buyer seasonably to furnish an agreed letter of credit is a breach of the contract.

Delivery
thereof
suspends
payment
obligation

- (3) The delivery to the seller of a proper letter of credit suspends the buyer's obligation to pay, but if it is dishonoured, the seller may on seasonable notification to the buyer require payment directly from him.

Sources: UCC 2-325.

Interpretation

5.26.—(1) In this section,

- (a) "sale on approval" means a contract in which the goods are delivered primarily for use and in which the buyer has the right to return delivered goods even though they conform to the contract;
- (b) "sale or return" means a contract in which the goods are delivered for resale and in which the buyer has the right to return delivered goods even though they conform to the contract.

Special
incidents
of sale
on approval

- (2) In a sale on approval,

- (a) although the goods are identified to the contract, the risk of loss and the title do not pass to the buyer until acceptance;
- (b) use of the goods consistent with the purpose of trial is not acceptance, but failure seasonably to notify the seller of the buyer's election to return the goods or any other act adopting the transaction is acceptance, and, if the goods conform to the contract,

acceptance of any part is acceptance of the whole;
and

- (c) after due notification of the buyer's election to return, the return is at the seller's risk and expense, but a merchant buyer must follow any reasonable instructions.

(3) In a sale or return,

*Idem, sale
or return*

- (a) the option to return extends to the whole or any commercial unit of the goods so long as their condition remains substantially unchanged, but the option must be exercised seasonably; and
- (b) the return is at the buyer's risk and expense.

Sources: SGA s. 19, r. 4(i); UCC 2-326(1), 2-327.

PART VI

TRANSFER OF TITLE AND GOOD FAITH BUYERS

6.1.—(1) Except as otherwise provided in this Act, the provisions of this Act with respect to the rights, obligations and remedies of the seller, buyer and any third party apply without regard to the person who has title to the goods.

*General
irrelevance
of title*

(2) Where questions concerning title become material, title passes from the seller to the buyer at the time and in the manner agreed upon by the parties, except that,

*General rules
for the transfer
of title*

- (a) title cannot pass before goods have been identified to the contract as provided in section 7.1; and
- (b) any reservation by the seller of the title in goods shipped or delivered to the buyer is limited to the reservation of a security interest.

(3) Where there is no express agreement between the parties with respect to the time at which the title to the goods is to pass to the buyer, the following rules apply:

*Idem, where
no time
specified for
title to pass*

1. Title passes at the time and place at which the seller completes his performance with reference to the physical delivery of the goods despite the reservation of a security interest and even though a document of title is to be delivered at a different time or place.
2. Where delivery is to be made without moving the goods and the seller is to deliver a document of title, title passes at the time when, and the place

where, he delivers the document, and, in any other case where delivery is to be made without moving the goods, title passes to the buyer on his receipt of the goods.

Where title
is revested
in seller

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance reverts title to the goods in the seller.

Sources: UCC 2-401; new.

Interpretation

6.2. In this Part, other than in sections 6.1 and 6.5 and subject to section 3.4(2), “goods” includes a document of title.

Sources: SGA s. 25(1), (2).

Nemo dat rule

6.3. Except as otherwise provided in this Part, where goods are sold by a person who does not own them and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title than the seller had.

Sources: SGA s. 22 (part).

Exceptions

6.4.—(1) Section 6.3 does not apply,

(a) where the owner of the goods is by his conduct precluded from denying the seller’s authority to sell;

and it does not affect

R.S.O. 1970,
c. 156

(b) *The Factors Act* or any other enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof; or

(c) the validity of any contract of sale under any common law or statutory power of sale or under the order of a court of competent jurisdiction.

Owner’s failure
to exercise
reasonable care

(2) Without limiting the generality of subsection 1(a), an owner is precluded from denying the authority to sell of the person in possession of the goods, where

(a) he has failed to exercise reasonable care with respect to the entrustment of the goods; and

(b) the buyer has exercised reasonable care in buying the goods and has received the goods in good faith, for value and without notice of the defect in the title of the transferor.

* (3) If in an action between the owner and the buyer the court finds that both have failed to exercise reasonable care, the court may allocate the loss between them and make such other order with respect to the goods as is fair in the circumstances.

Failure of owner and buyer to exercise reasonable care

Sources: SGA s. 22; new.

6.5.—(1) A person with a voidable title has power to transfer a good title to a buyer who receives the goods in good faith, for value, and without notice of the defect in the title of the transferor.

Effect of voidable title

- (2) A person is deemed to have a voidable title even if,
- (a) the transferor was deceived as to the identity of the buyer;
 - (b) the goods were delivered in exchange for a cheque that is later dishonoured;
 - (c) it was agreed that the transaction was to be a cash sale;
 - (d) the transfer of title was procured by fraud; or
 - (e) the transaction was entered into under a mistake of such a character as to render the agreement void at common law.

Extended meaning of voidable title

Sources: UCC 2-403(1); new.

6.6.—(1) In the cases mentioned in subsection 2, a seller, buyer or prospective buyer has power to transfer a good title or interest to a person who buys or leases and receives the goods from him in good faith, for value, and without notice of the defect in the title of the transferor.

Effect of possession of goods by seller, etc.

- (2) Subsection 1 applies
- (a) where a seller, having sold goods, continues or is in possession of the goods with the buyer's consent, whether in his capacity as seller or otherwise; or
 - (b) where a buyer or prospective buyer obtains or is in possession of the goods with the seller's or owner's consent before title in the goods has been transferred to him.

Where subs. 1 applies

- (3) Subsection 1 does not apply,

Where subs. 1 does not apply

*The Commission makes no recommendation concerning the enactment of this subsection. It has been inserted in the Draft Bill to draw attention to the issue and to stimulate discussion.

R.S.O. 1970,
c. 344

- (a) where a security interest to which *The Personal Property Security Act* applies has been created in favour of the buyer or seller; or
- (b) where, in any other case, a notice in the prescribed form has been filed under *The Personal Property Security Act* prior to the disposition of the goods by the person in possession.

Meaning of
prospective
buyer

(4) For the purpose of this section, a prospective buyer means,

- (a) a person who receives the goods
 - (i) under a sale on approval or under a contract of sale or return, or
 - (ii) with an option to purchase; and
- (b) a person whose offer to buy the goods has been accepted subject to approval by a third person or the fulfillment of any other condition.

Sources: SGA s. 25; new.

Entrustment
of goods to
merchant

6.7.—(1) Notwithstanding section 6.6, any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer or lessee in the ordinary course of business.

Meaning of
entrusting

(2) For the purpose of subsection 1, “entrusting” includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor’s disposition of the goods has been fraudulent.

Sources: UCC 2-403(2),(3).

Effect of
avoidance
of sale and
revocation
of consent

6.8. Unless the goods are recovered by the owner before they have been delivered by the person in possession of them to the third party,

- (a) section 6.5 applies even though the transferor has purported to avoid the sale; and
- (b) sections 6.6 and 6.7 apply even though the owner has revoked his consent to possession of the goods by the seller, buyer, prospective buyer or merchant, as the case may be.

Sources: The Factors Act, R.S.O. 1970, c. 156, s. 2(2); new.

Right of
owner to
recover goods

6.9. Where sections 6.4(2), 6.5 and 6.6 apply and a court considers it fair to make such an order, the owner may recover

the goods from the buyer or any person claiming from or under him on repaying the buyer or such other person, as the case may be, the price or, if the price was not in the form of money, its equivalent value in money, paid by the buyer or such other person for the goods, together with such other reliance losses as he would otherwise suffer and as the court may order to be paid.

Sources: New.

PART VII

PERFORMANCE

7.1.—(1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are non-conforming and he has an option to return or reject them.

Buyer's special
property and
insurable
interest

(2) Such identification can be made at any time and in any manner expressly agreed upon by the parties.

Identification
matter of
agreement

(3) In the absence of express agreement identification occurs,

Presumptive
rules

(a) when the contract is made if it is for the sale of goods already existing and agreed upon by the parties as the goods to be delivered under the contract;

(b) if the contract is for the sale of future goods other than those described in clause c, when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers; or

(c) when the crops are planted or otherwise become growing crops or the young are conceived if,

(i) the contract is for the sale of crops to be harvested within twelve months or the next normal harvest season after contracting, whichever is longer, or

(ii) the contract is for the sale of unborn young to be born within twelve months after contracting.

(4) The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him.

Seller's
insurable
interest

(5) Where the identification is by the seller alone he may,

Seller's right
to substitute
goods

(a) until the buyer's default or insolvency; or

- (b) until he has notified the buyer that the identification is final,

substitute other goods for those identified.

Other insurable
interest not
affected

- (6) Nothing in this section impairs any insurable interest recognized under any other law of Ontario.

Sources: UCC 2-501.

Manner of
seller's tender
of delivery

7.2.—(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery.

Idem

- (2) The manner, time and place for tender are determined by the agreement and this Act, and in particular,

- (a) tender must be at a reasonable hour and, if it is of goods, they must be kept available for the period reasonably necessary to enable the buyer to take possession; but

- (b) the buyer must furnish facilities reasonably suited to the receipt of the goods.

Compliance
with
section 7.3

- (3) Where section 7.3 applies, tender requires that the seller comply with its provisions.

Goods in
possession
of bailee

- (4) Where goods are in the possession of a bailee and are to be delivered without being moved,

- (a) tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgment by the bailee of the buyer's right to possession of the goods; but

- (b) tender to the buyer of a non-negotiable document of title or of a written direction to the bailee to deliver is sufficient tender unless the buyer seasonably objects, and receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons, but risk of loss of the goods and of any failure by the bailee to honour the non-negotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honour the document or to obey the direction defeats the tender.

Tender of
documents

- (5) Where the contract requires the seller to deliver documents,

- (a) he must tender all such documents in correct form,

except as provided in section 5.23 with respect to bills of lading in a set; and

- (b) tender through customary banking channels is sufficient and dishonour of a bill of exchange accompanying the documents constitutes non-acceptance or rejection.

Sources: UCC 2-503(1),(2),(4),(5).

7.3. Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then he must,

Shipment
by seller

- (a) put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and
- (b) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and
- (c) promptly notify the buyer of the shipment.

Sources: UCC 2-504.

7.4.—(1) Where the seller has identified goods to the contract by or before shipment,

Seller's
shipment under
reservation

- (a) his procurement of a negotiable bill of lading to his own order or otherwise reserves in him a security interest in the goods;
- (b) the seller's procurement of such a bill of lading to the order of a financing agency or of the buyer indicates in addition only the seller's expectation of transferring that interest to the person named; and
- (c) the procurement of a non-negotiable bill of lading to himself or his nominee also reserves a security interest in the goods but, except in the case of a conditional delivery governed by section 7.6, a non-negotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession of the bill of lading.

(2) Where shipment by the seller with reservation of a security interest violates the contract of sale it constitutes an improper contract for transportation within section 7.3 but does not impair the rights given to the buyer by shipment and identification of the goods to the contract or the seller's powers as holder of a negotiable document of title.

Wrongful
reservation
of security
interest

Sources: UCC 2-505.

Rights of
financing
agency

7.5.—(1) A financing agency by paying or purchasing for value a bill of exchange that relates to a shipment of goods acquires to the extent of the payment or purchase, and in addition to its own rights under the bill of exchange and any document of title securing it, any rights of the seller in the goods, including the right to stop delivery and the seller's right to have the bill of exchange honoured by the buyer.

Idem

(2) The right to reimbursement of a financing agency which has in good faith honoured or purchased a bill of exchange under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular on its face.

Sources: UCC 2-506.

Tender of
delivery
by seller

7.6.—(1) Tender of delivery is a condition of the buyer's duty to accept and pay for the goods.

Rights of
buyer
conditional

(2) Where goods or documents of title are delivered to the buyer and payment is due and demanded, his right as against the seller to retain or dispose of them is conditional upon his making the payment due.

Sources: SGA ss. 20(3), 27; UCC 2-507.

Meaning of
cure

7.7.—(1) In this section and in sections 7.9 and 8.8, "cure" means,

- (a) tender or delivery of any missing part or quantity of the goods;
- (b) tender or delivery of other goods or documents which are in conformity with the contract;
- (c) the remedying of any other defect, including a defect in title; or
- (d) a money allowance or other form of adjustment of the terms of the contract.

Seller's right
to cure

(2) Except in a case of late tender or delivery amounting to a substantial breach, where the buyer,

- (a) rightfully rejects a non-conforming tender or delivery, whether before or after the time for performance has expired; or
- (b) revokes his acceptance of the goods,

the seller has a reasonable time to cure the non-conformity,

- (c) if he seasonably notifies the buyer;

(d) if the non-conformity can be cured without unreasonable prejudice, risk or inconvenience to the buyer; and

(e) if the type of cure offered by the seller is reasonable in the circumstances.

(3) Subsection 2 does not apply where a demand to cure is made pursuant to subsection 4 or 8. When seller's right to cure inapplicable

(4) Whether or not the non-conformity is such as to entitle the buyer to reject the tender or delivery, the buyer may require the non-conformity to be cured within a reasonable time, Buyer's right to demand cure

(a) if the demand is made seasonably and before the buyer has accepted the goods;

(b) if the non-conformity can be cured without unreasonable prejudice, risk or expense to the seller, and

(c) if the type of cure demanded by the buyer is reasonable in the circumstances.

(5) If the non-conformity is not cured under subsection 4, the buyer may reject the tender or delivery and exercise the same remedies as if the non-conformity amounted to a substantial breach of the seller's obligations. Consequences of failure to cure

(6) A demand by the buyer under subsection 4 does not of itself amount to a waiver of any rights he may have under any other provision of this Act. Waiver

(7) Where the seller elects to cure a non-conformity under subsection 2, or in the case of a substantial breach the buyer makes a demand under subsection 4, the buyer may suspend performance of his obligations until the non-conformity has been cured and neither the seller's election nor the buyer's demand affects the buyer's right to recover damages in respect of the non-conformity. Buyer's right to suspend performance of his obligations

(8) Where the seller fails to tender or deliver the goods or document of title on the date or within the time provided in the contract, the buyer may fix a further reasonable period for the performance of either of such obligations and, if the failure is not cured by the seller within the further period, the buyer may treat the breach as a substantial breach. Buyer's right to fix further period for tender or delivery: substantial breach

Sources: NSW Draft Bill ss. 54D, 54E; UNCITRAL Arts. 21, 28, 29, 30; new.

7.8.—(1) Subject to sections 5.26 and 7.9, the following rules govern the transfer of risk of loss of the goods: Risk of loss in absence of breach

1. Where the contract requires or authorizes the seller to ship the goods by carrier,
 - (a) unless it requires him to deliver at a particular destination, the risk passes to the buyer when they are delivered to the carrier even though the shipment is under reservation; but
 - (b) if it does require him to deliver them at a particular destination and they are there tendered while in the possession of the carrier, the risk passes to the buyer when they are there so tendered as to enable the buyer to take delivery; and
 - (c) if the seller is a merchant and the buyer is not a merchant, risk passes when the goods are tendered to the buyer at the destination.
2. Where the goods are held by a bailee other than the seller and are to be delivered without being moved, the risk passes to the buyer,
 - (a) on his receipt of a negotiable document of title covering them;
 - (b) on acknowledgment by the bailee of the buyer's right to possession of them; or
 - (c) after his receipt of a non-negotiable document of title or other written direction to deliver as provided in section 7.2(4)(b).
3. Where rules 1 and 2 do not apply, the risk passes to the buyer on his receipt of the goods.

Saving

(2) Nothing in this section affects the duties or liabilities of either seller or buyer as a bailee of the goods of the other party.

Sources: UCC 2-509; new.

Effect of breach on risk of loss

7.9.—(1) Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance.

Where buyer rightfully revokes acceptance

(2) Where the buyer rightfully revokes acceptance, he may to the extent of any deficiency in his insurance coverage treat the risk of loss as if the risk of loss had never been transferred to him.

Where buyer in breach

(3) Where the buyer as to conforming goods already identified to the contract repudiates or is otherwise in breach

before risk of their loss has passed to him, or where the buyer has wrongfully but effectively rejected the goods, the seller may to the extent of any deficiency in his insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time sufficient to enable him to insure the goods.

Sources: UCC 2-510.

7.10.—(1) Tender of payment is a condition to the seller's duty to tender and complete any delivery. Tender of payment by buyer

(2) Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it. Manner of tender

(3) Payment by cheque is conditional and is defeated as between the parties if the cheque is dishonoured. Payment by cheque

Sources: UCC 2-511.

7.11.—(1) Where the contract requires payment before inspection non-conformity of the goods does not excuse the buyer from so making payment unless, Payment before inspection

(a) the non-conformity appears without inspection; or

(b) the seller has acted fraudulently.

(2) Payment pursuant to subsection 1 does not constitute an acceptance of goods or impair the buyer's right to inspect or any of his remedies. Idem

Sources: UCC 2-512.

7.12.—(1) Subject to subsection 4, where goods are tendered or delivered or identified to the contract, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. Buyer's right to inspect goods

(2) Where the seller is required or authorized to send the goods to the buyer, the inspection may be made after their arrival. Inspection after arrival

(3) Expenses of inspection must be borne by the buyer but may be recovered from the seller if the goods do not conform and are rejected. Expenses of inspection

(4) Subject to section 5.21, the buyer is not entitled to inspect the goods before payment of the price when the contract provides, Inspection before payment

(a) for delivery "C.O.D." or on similar terms; or

(b) for payment against documents of title except where

such payment is due only after the goods are to become available for inspection.

Place and method of inspection

(5) A place or method of inspection fixed by the parties is presumed to be exclusive but, unless otherwise expressly agreed, it does not postpone identification or shift the place for delivery or for passing the risk of loss.

Where agreed place or method of inspection impossible

(6) If inspection at the place or by the method fixed by the parties becomes impossible, inspection shall be as provided in this section unless the place or method fixed was clearly intended as an indispensable condition failure of which would avoid the contract.

Sources: UCC 2-513.

When documents deliverable

7.13. Documents against which a bill of exchange is drawn are to be delivered to the drawee upon acceptance of the bill of exchange if it is payable more than three days after presentment, and in other cases, only upon payment.

Sources: UCC 2-514.

Preserving evidence of goods in dispute

7.14.—(1) In order to facilitate the adjustment or resolution of a claim or dispute between a buyer and a seller, either party, for the purpose of ascertaining the facts and preserving evidence, has the right to inspect, test and sample the goods, but where the goods are in the possession or control of the other, such right may only be exercised on reasonable notification to the other party.

Where access refused

(2) Where a party is refused the right to inspect, test and sample the goods, he may apply to the county or district court of the county or district in which the goods or any part of them are situated or in which the party against whom the order is sought resides or has a place of business and a judge of the court may, upon such terms as to notice and otherwise as he considers proper, make whatever order seems to him to be just in all the circumstances of the case.

Rights under rules of court preserved

(3) The rights conferred by subsections 1 and 2 are in addition to any rights conferred under the rules of court of the court in which proceedings relating to the contract of sale have been commenced.

Sources: UCC 2-515(a); new.

PART VIII

BREACH, REPUDIATION AND EXCUSE

Buyer's rights on improper delivery

8.1. Subject to section 8.12, if the goods or the tender of delivery are non-conforming and the non-conformity amounts to a substantial breach of the contract, the buyer may,

- (a) reject the whole;
- (b) accept the whole; or
- (c) accept one or more commercial units and reject the rest.

Sources: UCC 2-601; new.

8.2.—(1) To constitute effective rejection, the buyer,

Requirements
of effective
rejection

- (a) must not have accepted the goods; and
- (b) must seasonably notify the seller of his action.

(2) Subject to sections 8.3 and 8.4,

Buyer's duties
after rejection

- (a) after rejection, use of the goods or other acts of ownership by the buyer are *prima facie* wrongful as against the seller but do not nullify the rejection unless the seller has been materially prejudiced thereby; and
- (b) if, before rejection, the buyer has taken physical possession of goods in which he does not have a security interest, he must after rejection hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them but the buyer has no other obligations with regard to goods rightfully rejected.

(3) This section and sections 8.3, 8.4 and 8.5 shall also apply to goods wrongfully but effectively rejected by the buyer, but such rejection does not affect the seller's rights under section 9.3.

Where goods
wrongfully
but effectively
rejected

Sources: UCC 2-602; new.

8.3.—(1) Subject to any security interest in the buyer, when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after effective rejection of goods in his possession or control,

Merchant
buyer's duties
with respect
to rejected
goods

- (a) to follow any reasonable instructions received from the seller with respect to the goods; and
- (b) in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline rapidly in value.

(2) For the purpose of subsection 1, instructions are not reasonable if on demand the buyer is not indemnified for expenses.

Idem

Buyer's right
to expenses

(3) Where the buyer sells goods under subsection 1, he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses do not include a selling commission then to such commission as is usual in the trade or, if there is none, to a reasonable sum not exceeding ten per cent of the gross proceeds.

Subs. 1 does
not affect
other rights

(4) Where the parties do not agree as to the buyer's right to reject the goods, any instructions given to or action taken by the buyer pursuant to subsection 1 do not affect any other rights of the parties, including the right of the seller to recover any payments made to the buyer under subsection 3 where the buyer has wrongfully rejected the goods.

Buyer must
act in
good faith

(5) In complying with this section the buyer must act in good faith and with reasonable care.

Good faith
conduct not
acceptance, etc.

(6) Good faith conduct by the buyer under this section shall be deemed not to be acceptance or conversion or to give rise to a claim in damages.

Sources: UCC 2-603; new.

Buyer's
options as to
salvage of
rejected
goods

8.4.—(1) Subject to section 8.3 with respect to perishable goods or goods that threaten to decline rapidly in value, if the seller gives no instructions within a reasonable time after notification of rejection the buyer may,

(a) store the rejected goods for the seller's account;

(b) reship them to him; or

(c) resell them for the seller's account and claim reimbursement under subsections 3 to 6 of section 8.3.

Salvage not
acceptance, etc.

(2) Any such action shall be deemed not to be acceptance or conversion of the goods or to give rise to a claim in damages.

Sources: UCC 2-604.

Waiver
of buyer's
objections

8.5.—(1) The buyer's failure to state in connection with rejection a particular defect that is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach where the seller could have cured the defect if it had been stated seasonably.

Payment
against
documents

(2) Payment against documents made without reservation of rights precludes recovery of the payment for defects apparent on the face of the documents.

Sources: UCC 2-605.

8.6.—(1) The buyer shall be deemed to have accepted the goods, What constitutes acceptance of goods

- (a) where after a reasonable opportunity to inspect the goods he signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity;
- (b) where he fails to make an effective rejection after he has had a reasonable opportunity to inspect the goods; or
- (c) where the goods are no longer in substantially the condition in which the buyer received them, but this clause does not apply to a change in the condition of the goods caused by their own defects or to casualty suffered by them while at the seller's risk.

(2) Acceptance of a part of a commercial unit is acceptance of the entire unit. Commercial units

Sources: UCC 2-606, 2-608; UNCITRAL Art. 53.

8.7.—(1) The buyer must pay at the contract rate for any goods accepted. Effect of acceptance

(2) Where the buyer has accepted the goods, he may revoke his acceptance only as provided in section 8.8, but acceptance does not of itself impair any other remedy provided by this Act. Idem

Sources: UCC 2-607(1),(2).

8.8.—(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity amounts to a substantial breach if he has accepted it, Revocation of acceptance

- (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or
- (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances that the goods conformed.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in the condition of the goods which is not caused by their own defects or by casualty suffered by them while at the seller's risk. Conditions of revocation

(3) Such revocation is not effective until the buyer notifies the seller of it. Idem

Buyer's
position after
revocation

(4) A buyer who rightfully revokes has the same rights and duties with regard to the goods as if he had rejected them.

Sources: UCC 2-608.

Right to
adequate
assurance of
performance

8.9.—(1) Where reasonable grounds for insecurity arise with respect to the performance of either party, the other party may in writing demand adequate assurance of due performance and until he receives such assurance may if reasonable suspend any performance for which he has not already received the agreed return.

Idem

(2) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of further performance.

Failure to
provide
adequate
assurance

(3) After receipt of a demand, failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances is a repudiation of the contract.

Where
adequate
assurance
is provided

(4) Upon adequate assurance being provided, the aggrieved party's obligation to perform is restored but he is not liable for any delay occasioned by his suspension of performance.

Sources: UCC 2-609(1),(3),(4); new.

Anticipatory
repudiation

8.10.—(1) Where either party repudiates the contract with respect to a performance not yet due the loss of which would amount to a substantial breach of the contract, the aggrieved party may,

- (a) resort to any remedy for breach;
- (b) suspend his own performance; or
- (c) where the contract is repudiated by the buyer, proceed in accordance with section 9.5 respecting the seller's right to identify goods to the contract or to salvage unfinished goods.

Application of
subs. 1(a)

(2) Subsection 1(a) applies whether or not the aggrieved party has awaited performance after learning of the repudiation and even though he has notified the repudiating party that he would await the latter's performance or has urged him to perform in spite of his repudiation.

Where
repudiating
party suffers
loss

(3) Where the repudiating party has suffered foreseeable detriment or loss as a result of his reliance upon a notification or urging under subsection 2, the aggrieved party,

- (a) shall not exercise his remedies under this section

unless he first gives the repudiating party reasonable notice of his intention to do so; and

(b) is liable to compensate the repudiating party for such foreseeable detriment or loss as he has suffered before the notice mentioned in clause a.

(4) The repudiating party is not liable in any event for loss or damage that the aggrieved party should have foreseen and could have mitigated or avoided without undue risk, expense or prejudice. Duty to mitigate loss

Sources: Restatement s. 280; Restatement (Tent. Draft) s. 336; UCC 2-610; new.

8.11.—(1) The repudiating party may retract his repudiation at any time before his next performance is due unless the aggrieved party has since the repudiation cancelled the contract or materially changed his position or otherwise indicated that he considers the repudiation final. Retraction of repudiation

(2) Retraction may be by any method that clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under section 8.9. Methods of retraction

(3) Retraction reinstates the repudiating party's rights under the contract but the aggrieved party is not liable, and is entitled to be compensated, for any delay occasioned by the repudiation. Consequences of retraction

Sources: UCC 2-611.

8.12.—(1) In this Act "instalment contract" means a contract that requires or authorizes the delivery of goods in separate lots to be separately accepted, notwithstanding a provision in the contract to the effect that each delivery is a separate contract. Meaning of instalment contract

(2) Subject to subsection 3, the buyer's rights and remedies with respect to a non-conforming instalment and the seller's rights and remedies with respect to breach by the buyer of his obligations in relation to an instalment are the same with respect to that instalment as if it were a separate contract. Remedies for breach of instalment

(3) If the non-conformity or breach with respect to one or more instalments substantially and foreseeably impairs the value of the whole contract to the other party, there is a substantial breach of the whole contract. Breach of the whole contract

Revocation of
acceptance of
instalment

(4) Where there has been a substantial breach of the whole contract by the seller, the buyer may, subject to section 8.8(2) and (3), revoke his acceptance of any instalment previously received by him.

Sources: UCC 2-612(1),(3) (part); new.

Non-existence
of or casualty
to identified
goods

8.13.—(1) Where, without fault of either party,

- (a) the parties have mistakenly assumed that the goods are in existence; or
- (b) the goods suffer or have suffered loss through casualty, including theft,

then, unless the circumstances indicate that either party has assumed a greater obligation, the following rules apply:

1. If the loss is total the seller's obligation to deliver the goods is discharged but the buyer is discharged from the obligation to pay the price only if the risk of such loss has not passed to the buyer.
2. If the risk of such loss has not passed to the buyer, and if the loss is partial or the goods have so deteriorated as no longer to conform to the contract, the buyer may
 - (a) inspect the goods; and
 - (b) either treat the contract as terminated or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without any other rights against the seller.
3. If the risk of such loss has passed to the buyer and the loss is partial or the goods have so deteriorated as no longer to conform to the contract, the seller is discharged to the extent of such loss or deterioration from the obligation to deliver conforming goods but the buyer remains liable for the full price.

Application
of subs. 1

(2) Subsection 1 applies,

- (a) to a contract that requires for its performance goods identified when the contract is made or goods that have been subsequently identified to the contract with the consent of the buyer and the seller; or
- (b) to a contract that contains a "no arrival, no sale" term.

Sources: Restatement (Tent. Draft) s. 281; UCC 2-613; new.

8.14.—(1) Where without fault of either party,

- (a) the agreed berthing, loading or unloading facilities fail;
- (b) an agreed type of carrier is unavailable; or
- (c) the agreed manner of delivery otherwise becomes commercially impracticable,

Substituted
performance:
shipment or
delivery

but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.

(2) Where the agreed means or manner of payment fails because of domestic or foreign law, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment that is commercially a substantial equivalent.

Idem, manner
of payment

(3) Where delivery has been made, payment by the means or in the manner provided by a law mentioned in subsection 2 discharges the buyer's obligation unless such law is discriminatory, oppressive or confiscatory.

Idem

Sources: UCC 2-614.

8.15.—(1) Subject to section 8.14,

- (a) delay in delivery or non-delivery in whole or in part by a seller who complies with clauses *b* and *c* is not a breach of his duty under a contract of sale if the agreed performance has been made impracticable,
 - (i) by the occurrence of a contingency that was not due to the fault of either party and the non-occurrence of which was a basic assumption on which the contract was made; or
 - (ii) by a compliance in good faith with any applicable foreign or domestic law whether or not it later proved to be valid;
- (b) where the causes mentioned in clause *a* affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers or, where there is only one customer, to that customer, but may at his option include regular customers not then under contract as well as his own requirements for further manufacture, and he may so allocate in any manner which is fair and reasonable; and
- (c) the seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under clause *b*, of the estimated quota thus made available for the buyer.

Excuse by
failure of
pre-supposed
conditions

(2) Subsection 1 and section 8.16 apply *mutatis mutandis* where the buyer's agreed performance has been made impracticable.

Sources: UCC 2-615; new.

Procedure on
notice
claiming
excuse

8.16.—(1) Where the buyer is notified pursuant to section 8.15 of a material or indefinite delay or of an allocation of goods, he may, by written notification to the seller,

- (a) terminate and thereby discharge any unexecuted portion of the contract; or
- (b) modify the contract by agreeing to the delay, or agreeing to take his available quota in substitution with due allowance from the contract price.

Termination
of contract

(2) If after receipt of such notification the buyer fails so to modify the contract within a reasonable time not exceeding thirty days the contract is terminated with respect to any deliveries affected.

Application
of subs. 1, 2

(3) Subsections 1 and 2 apply,

- (a) to a single delivery; and
- (b) to all deliveries under an instalment contract where the prospective deficiency substantially impairs the value of the whole contract.

Sources: UCC 2-616(1),(2).

Application
of R.S.O.
1970, c. 185

8.17.—(1) *The Frustrated Contracts Act* applies,

- (a) to a contract of sale that has been terminated pursuant to sections 8.13 to 8.16; and
- (b) to a buyer who has accepted partial or delayed performance pursuant to section 8.13, 8.15 or 8.16.

(2) If there is a conflict between the provisions of this Act and the provisions of *The Frustrated Contracts Act*, this Act prevails.

Sources: New.

PART IX

REMEDIES

Remedies
for breach
of collateral
contracts

9.1. Nothing in this Act impairs any remedy of a buyer or seller for breach of any obligation or promise collateral or ancillary to the contract of sale.

Sources: UCC 2-701.

9.2. Where the buyer is insolvent, the seller may refuse delivery as provided in section 9.7 and stop delivery under section 9.8.

Seller's remedies on buyer's insolvency

Sources: SGA s. 39(1)(c).

9.3.—(1) Where the buyer breaches the contract, the seller may,

Index of seller's remedies

- (a) maintain an action for damages;
 - (b) withhold delivery of any goods in his possession;
 - (c) stop delivery by any bailee;
 - (d) in a proper case recover the price,
- as provided in this Act.

(2) Where the buyer's conduct amounts to a substantial breach, the seller, in addition to his rights under subsection 1, may exercise any one or more of the following rights:

Idem

1. Cancel the contract
 - (i) with respect to any undelivered goods,
 - (ii) where the buyer has wrongfully rejected or revoked acceptance, or
 - (iii) where the goods are in the buyer's possession and the seller is otherwise entitled to reclaim them.
2. Proceed under section 9.5 respecting goods still unidentified to the contract.
3. Resell and recover damages as provided in this Act.

Sources: UCC 2-703; new.

9.4.—(1) Where the buyer,

Seller's right to demand cure

- (a) fails to pay any sum due for the goods before the goods are received by him; or
- (b) fails to take delivery of the goods or document of title thereto on the date or within the time provided in the contract,

the seller may fix a further reasonable period for the performance of either of such obligations and, if the failure is not cured by the buyer within the further period, the seller may treat the breach as a substantial breach.

(2) For the purpose of subsection 1,

Meaning of failure to pay and failure to take delivery

- (a) a failure to pay includes a failure to make such arrangements for payment as are required under section 5.1(2); and

- (b) a failure to take delivery includes a failure to perform such acts as are required of the buyer under the terms of the contract to enable the seller to make delivery.

Sources: UNCITRAL Arts. 45, 46(1)(b).

Seller's right
to identify
goods

9.5.—(1) Where there has been a substantial breach by the buyer, the seller may,

- (a) identify to the contract conforming goods not already identified if, at the time he learned of the breach, the goods are in his possession or control; or
- (b) treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished.

Unfinished
goods

(2) Where the goods are unfinished at the time of the breach, the seller must exercise reasonable commercial judgment for the purposes of effective realization and avoidance of loss, and to these ends may,

- (a) complete the manufacture and wholly identify the goods to the contract; or
- (b) cease manufacture and resell for scrap or salvage value; or
- (c) proceed in any other reasonable manner.

Sources: UCC 2-704.

Person
in position
of seller

9.6. In sections 9.7, 9.8 and 9.9 "seller" includes a person who is in the position of a seller such as an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid or is directly responsible for the price, or anyone who otherwise holds a security interest in the goods.

Sources: SGA s. 37(2).

Seller's rights
to withhold
delivery

9.7.—(1) The seller may withhold delivery of goods in his possession,

- (a) until the buyer pays any sum due on or before delivery;
- (b) until payment of the price where the buyer is insolvent; or
- (c) where the buyer repudiates the contract, until retraction of the repudiation as provided in section 8.11.

(2) The seller's right to withhold delivery under subsection 1 extends to any reasonable expenses in relation to the care and custody, transportation, and stoppage of the goods, and other incidental expenses incurred by him subsequent to the buyer's breach or insolvency.

Seller's
expenses

(3) The seller may exercise his right to withhold delivery notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

Where seller
agent or
bailee

(4) Where an unpaid seller has made part delivery of the goods, whether under an indivisible contract or under an instalment contract, he may withhold delivery of the remainder until payment of all amounts that are due unless the part delivery has been made under such circumstances as show an agreement to waive the right to withhold delivery.

Part delivery

(5) A seller who may withhold delivery or stop delivery under section 9.8 does not lose his right to do so by reason only that he has obtained judgment for the price of the goods.

Judgment
no bar

Sources: SGA ss. 39(2), 40, 41(2); ULIS Art. 91; UNCITRAL Art. 60; new.

9.8.—(1) The seller may stop delivery of goods in the possession of a carrier or other bailee,

Seller's
stoppage
of delivery

- (a) if he discovers the buyer to be insolvent;
- (b) if the buyer repudiates;
- (c) if the buyer fails to make a payment due before delivery; or
- (d) if for any other reason the seller has a right to withhold or reclaim the goods.

(2) The seller may stop delivery as against a buyer within the meaning of subsection 1 until,

When right
ceases

- (a) the buyer receives the goods;
- (b) any bailee of the goods, except a carrier, acknowledges to the buyer that he holds the goods for the buyer;
- (c) the course of transit of goods in the possession of a carrier has ended; or
- (d) a negotiable document of title relating to the goods has been negotiated to the buyer.

(3) Where after the arrival of the goods at the appointed destination the carrier acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent, the

End of course
of transit

transit is at an end and it is immaterial that a further destination for the goods may have been indicated by the buyer.

Effect of
buyer's
rejection

(4) Where the goods are rejected by the buyer and the carrier continues in possession of them, the transit shall be deemed not to be at an end even if the seller has refused to receive them back.

Carrier's
refusal to
deliver

(5) Where the carrier wrongfully refuses to deliver the goods to the buyer or his agent, the transit shall be deemed to be at an end.

Part
delivery

(6) Where delivery of part of the goods has been made to the buyer or his agent, delivery of the remainder may be stopped unless delivery of the part has been made under such circumstances as show an agreement to give up possession of the whole of the goods.

Notification
to bailee

(7) To stop delivery the seller must notify the bailee in sufficient time to enable the bailee by reasonable diligence to prevent delivery of the goods.

Idem

(8) After such notification the bailee must hold and deliver the goods according to the directions of the seller, but the seller is liable to the bailee for any ensuing charges or damages.

Idem

(9) Where a negotiable document of title has been issued for the goods, the bailee is not obliged to obey a notification to stop until surrender of the document.

Idem

(10) A carrier who has issued a non-negotiable bill of lading is not obliged to obey a notification, received from a person other than the consignor, to stop delivery of the goods.

Sources: SGA s. 43(3),(4),(6),(7); UCC 2-705.

Seller's right
to resell

9.9.—(1) Where the buyer has committed a substantial breach of the contract of sale and the seller is entitled to cancel, the seller may resell the goods concerned or the undelivered balance thereof and, if the resale is made in good faith and in a commercially reasonable manner, the seller may recover the difference between the resale price and the contract price less expenses saved in consequence of the buyer's breach.

Method
of resale

(2) The resale may be by public or private sale and may include sale by way of one or more contracts to sell or by way of identification to an existing contract of the seller.

Idem

(3) The sale may be as a unit or in parcels or at any time and place and on any terms, but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable.

(4) The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

Idem

(5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

Purchaser in good faith

(6) If the seller does not resell in a commercially reasonable manner, he may not sue for damages under this section.

Seller not reselling properly

(7) The seller is not accountable to the buyer for any profit made on a resale.

Seller not accountable for profit

Sources: UCC 2-706(1),(2),(5),(6); new.

9.10.—(1) Where the buyer breaches the contract the seller may maintain an action against him for damages.

Seller's right to damages

(2) The measure of damages is the estimated loss which, having regard to the buyer's knowledge of all the circumstances, he ought to have foreseen as likely to result from his breach of contract.

Computation of measure of damages

(3) Where at the agreed time for performance and in circumstances amounting to a substantial breach the buyer wrongfully neglects or refuses to accept and pay for the goods and section 9.9 does not apply, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the price that could have been obtained by a commercially reasonable disposition of the goods within or at a reasonable time and place after the seller learned of the buyer's breach, less any expenses saved in consequence of the buyer's breach.

Idem, where refusal to accept goods

(4) Subsection 3 does not apply,

Exceptions

(a) where the seller's actual loss is less than the loss he would be deemed to suffer if the subsection were applied; or

(b) where there is no market for the goods or the measure of damages would be inadequate to put the seller in as good a position as performance by the buyer would have done.

Sources: SGA s. 48; UCC 2-708; new.

9.11.—(1) Where the buyer fails to pay the price as it becomes due, the seller may recover the price due,

Seller's action for the price

- (a) of goods accepted unless acceptance has been justifiably revoked;
- (b) of conforming goods lost or damaged while the risk of their loss is upon the buyer; or
- (c) of goods identified to the contract if the seller, being entitled to do so, is unable after reasonable effort to resell them at a reasonable price or the circumstances indicate that such effort will be unavailing.

Seller's obligation to hold goods

(2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control, except that if resale becomes possible he may resell them at any time prior to the collection of the judgment, in which case the net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

Right to damages for non-acceptance

(3) After the buyer has wrongfully rejected the goods or has failed to make a payment due or has repudiated the contract, the seller who is not entitled to the price under this section is nevertheless entitled to damages for non-acceptance.

Sources: UCC 2-709.

Index of buyer's remedies

9.12.—(1) Where the seller breaches the contract, the buyer may,

- (a) maintain an action for damages;
- (b) seek specific performance,

as provided in this Act.

Idem

(2) Where the seller's conduct amounts to a substantial breach and the seller repudiates, fails to make delivery or to perform an act due before delivery, or where the buyer rightfully rejects or revokes acceptance, the buyer, in addition to his rights under subsection 1 and subject to section 7.7, may exercise any one or more of the following rights:

1. Cover and recover damages as provided in this Act.
2. Cancel the contract.
3. Recover so much of the price as has been paid.

Sources: UCC 2-711(1),(2); new.

Buyer's security interest in rejected goods

9.13. On rightful rejection or justifiable revocation of acceptance the buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt,

transportation, care and custody and may hold them and resell them, and section 9.9 applies *mutatis mutandis*.

Sources: UCC 2-711(3).

9.14. Any claim by the buyer for the return of the purchase price is subject to such reduction on account of any benefits derived by him from the use or possession of the goods as is just in the circumstances.

Buyer's claim
for return
of price

Sources: UNCITRAL Art. 55(2); new.

9.15.—(1) Where the provisions of section 9.12(2) apply, the buyer may cover by making in good faith and without unreasonable delay any reasonable purchase of, or contract to purchase, goods in substitution for those due from the seller.

Buyer's
procurement
of substitute
goods

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price less expenses, if any, saved in consequence of the seller's breach.

Measure
of damages

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

Failure
to cover

Sources: UCC 2-712.

9.16.—(1) Where the seller breaches the contract, the buyer may maintain an action against him for damages.

Buyer's right
to damages

(2) The measure of damages is the estimated loss which, having regard to the seller's knowledge of all the circumstances, he ought to have foreseen as likely to result from his breach of contract.

Measure
of damages

(3) Where, at the agreed time for performance and in circumstances amounting to a substantial breach, the seller wrongfully neglects or refuses to deliver the goods to the buyer, or where the buyer rightfully rejects or revokes acceptance and section 9.15 does not apply, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the price at which the goods could have been obtained in a commercially reasonable purchase within or at a reasonable time and place after the buyer learned of the seller's breach of contract, less any expenses saved in consequence of the seller's breach.

Measure
of damages
where seller
refuses to
deliver

(4) Subsection 3 does not apply where the buyer's actual loss is less than the loss he would be deemed to suffer if the subsection were applied.

Where subs. 3
does not apply

Sources: SGA s. 49; UCC 2-713; new.

Buyer's
damages
for breach
respecting
accepted goods

9.17.—(1) Where there is a breach of contract by the seller and the buyer has accepted the goods, the buyer may,

- (a) set up against the seller the breach of contract in diminution or extinction of the price; or
- (b) maintain an action against the seller for damages for breach of contract.

Computation
of damages

(2) The measure of damages shall be the estimated loss which, having regard to the seller's knowledge of all the circumstances, he ought to have foreseen as likely to result from his breach of contract.

Measure
of damages

(3) In the case of a breach of warranty such loss is *prima facie* the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted.

Right
to maintain
action

(4) The fact that the buyer has set up the breach of contract in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of contract if he has suffered further damage.

Sources: SGA s. 51; UCC 2-714.

Buyer's right
to specific
performance

9.18. In an action against the seller for breach of contract to deliver promised goods, whether or not the goods existed or were identified at the time of the contract, the court may direct that the contract be performed specifically and may impose such terms and conditions as to damages, payment of the price, and otherwise, as seem just to the court.

Sources: SGA s. 50; new.

Incidental and
consequential
damages

9.19.—(1) A seller's or buyer's claim for damages may include a claim for incidental or consequential damages.

Idem, injury
to person
or damage
to property

(2) Consequential damages include injury to person or property proximately resulting from a breach of warranty.

Sources: SGA s. 52; UCC 2-710, 2-715; new.

Other causes
of action

9.20.—(1) The rights of action of an aggrieved party arising otherwise than in contract are not affected by the existence of a contract of sale unless the contract itself so provides.

Remedies
for fraud

(2) The remedies available for fraudulent misrepresentation inducing the formation of a contract include the remedies available under this Act for breach of warranty and the aggrieved party shall not be put to his election.

(3) Rescission or a claim for rescission of a contract of sale or rejection or return of the goods does not bar and does not of itself preclude a claim for damages or other remedy.

Effect of
rescission
or return
of goods

Sources: UCC 2-720, 2-721.

PART X

MISCELLANEOUS

10.1. This Act applies to contracts of sale and other transactions governed by this Act that are entered into on or after the day on which this Act comes into force.

Transitional
provision

10.2. *The Sale of Goods Act*, being chapter 421 of the Revised Statutes of Ontario, 1970, is repealed except for contracts of sale entered into before the day on which this Act comes into force.

Repeal

10.3. This Act comes into force on a day to be named by proclamation by the Lieutenant Governor.

Commence-
ment

10.4. The short title of this Act is *The Sale of Goods Act*,
19 .

Short title

APPENDIX 2

The Sale of Goods Act

R.S.O. 1970, c. 421

1.—(1) In this Act,

Interpretation

- (a) “action” includes a counterclaim and a set off;
- (b) “buyer” means the person who buys or agrees to buy goods;
- (c) “contract of sale” includes an agreement to sell as well as a sale;
- (d) “delivery” means the voluntary transfer of possession from one person to another;
- (e) “document of title” includes a bill of lading and warehouse receipt as defined by *The Mercantile Law Amendment Act*, any warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods or authorizing or purporting to authorize, either by endorsement or delivery, the possessor of the document to transfer or receive goods thereby represented; R.S.O. 1970,
c. 272
- (f) “fault” means a wrongful act or default;
- (g) “goods” means all chattels personal, other than things in action and money, and includes emblements, industrial growing crops, and things attached to or forming part of the land that are agreed to be severed before sale or under the contract of sale;
- (h) “plaintiff” includes a defendant counterclaiming;
- (i) “property” means the general property in goods and not merely a special property;
- (j) “quality of goods” includes their state or condition;
- (k) “sale” includes a bargain and sale as well as a sale and delivery;
- (l) “seller” means a person who sells or agrees to sell goods;
- (m) “specific goods” means the goods identified and agreed upon at the time the contract of sale is made;

(n) “warranty” means an agreement with reference to goods that are the subject of a contract of sale but collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.

Things
done in
good faith

(2) A thing shall be deemed to be done in good faith within the meaning of this Act when it is in fact done honestly whether it is done negligently or not.

What
deemed
insolvency

(3) A person shall be deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due.

Deliverable
state

(4) Goods shall be deemed to be in a “deliverable state” within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them. R.S.O. 1970, c. 421, s. 1.

PART I

FORMATION OF THE CONTRACT

Sale and
agreement
to sell

2.—(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration, called the price, and there may be a contract of sale between one part owner and another.

Absolute or
conditional

(2) A contract of sale may be absolute or conditional.

What
constitutes
a sale or
agreement
to sell

(3) Where under a contract of sale the property in goods is transferred from the seller to the buyer, the contract is called a sale, but, where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

When
agreement
becomes sale

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred. R.S.O. 1970, c. 421, s. 2.

Capacity

3.—(1) Capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property, but where necessaries are sold and delivered to a minor or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he shall pay a reasonable price therefor.

What deemed
necessaries

(2) Necessaries in this section mean goods suitable to the conditions in life of the minor or other person and to his actual

requirements at the time of the sale and delivery. R.S.O. 1970, c. 421, s. 3.

4. Subject to this Act and any statute in that behalf, a contract of sale may be made in writing, either with or without seal, or by word of mouth or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties, but nothing in this section affects the law relating to corporations. R.S.O. 1970, c. 421, s. 4.

Contract,
how made

5.—(1) A contract for the sale of goods of the value of \$40 or more is not enforceable by action unless the buyer accepts part of the goods so sold and actually receives them, or gives something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf.

Contracts
for \$40 or
more

(2) This section applies to every such contract notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of the contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering them fit for delivery.

Future
delivery

(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods that recognizes a pre-existing contract of sale, whether there is an acceptance in performance of the contract or not. R.S.O. 1970, c. 421, s. 5.

Acceptance of
goods, what
constitutes

6.—(1) The goods that form the subject of a contract of sale may be either existing goods owned or possessed by the seller or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called "future goods".

What goods
may be subject
of contract

(2) There may be a contract for the sale of goods the acquisition of which by the seller depends upon a contingency that may or may not happen.

Contingency

(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods. R.S.O. 1970, c. 421, s. 6.

Sale of
future goods

7. Where there is a contract for the sale of specific goods and the goods without the knowledge of the seller have perished at the time the contract is made, the contract is void. R.S.O. 1970, c. 421, s. 7.

Goods that
have perished

8. Where there is an agreement to sell specific goods and subsequently the goods without any fault of the seller or buyer perish before the risk passes to the buyer, the agreement is thereby avoided. R.S.O. 1970, c. 421, s. 8.

Goods
perishing
before sale
but after
agreement
to sell

Price determined	9. —(1) The price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing between the parties.
Where price not determined	(2) Where the price is not determined in accordance with the foregoing provisions, the buyer shall pay a reasonable price, and what constitutes a reasonable price is a question of fact dependent on the circumstances of each particular case. R.S.O. 1970, c. 421, s. 9.
Agreement to sell at valuation	10. —(1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party and the third party cannot or does not make the valuation, the agreement is avoided, but if the goods or any part thereof have been delivered to and appropriated by the buyer, he shall pay a reasonable price therefor.
Valuation prevented by act of party	(2) Where the third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault. R.S.O. 1970, c. 421, s. 10.
Stipulations as to time	11. Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not of the essence of a contract of sale, and whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract. R.S.O. 1970, c. 421, s. 11.
When condition to be treated a warranty	12. —(1) Where a contract of sale is subject to a condition to be fulfilled by the seller, the buyer may waive the condition or may elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.
Stipulation which may be condition or warranty	(2) Whether a stipulation in a contract of sale is a condition the breach of which may give rise to a right to treat the contract as repudiated or a warranty the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated depends in each case on the construction of the contract, and a stipulation may be a condition, though called a warranty in the contract.
Where breach of condition to be treated as breach of warranty	(3) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.

(4) Nothing in this section affects the case of a condition or warranty, fulfillment of which is excused by law by reason of impossibility or otherwise. R.S.O. 1970, c. 421, s. 12.

Fulfillment
excused by
impossibility

13. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is,

Implied
conditions
and warranties

- (a) an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass;
- (b) an implied warranty that the buyer will have and enjoy quiet possession of the goods; and
- (c) an implied warranty that the goods will be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made. R.S.O. 1970, c. 421, s. 13.

14. Where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description, and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description. R.S.O. 1970, c. 421, s. 14.

Sale by
description

15. Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

Implied
conditions
as to quality
or fitness

- 1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply (whether he is the manufacturer or not), there is an implied condition that the goods will be reasonably fit for such purpose, but in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.
- 2. Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or not), there is an implied condition that the goods will be of merchantable

quality, but if the buyer has examined the goods, there is no implied condition as regards defects that such examination ought to have revealed.

3. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.
4. An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith. R.S.O. 1970, c. 421, s. 15.

Sale by sample

16.—(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

Implied conditions

(2) In the case of a contract for sale by sample, there is an implied condition,

- (a) that the bulk will correspond with the sample in quality;
- (b) that the buyer will have a reasonable opportunity of comparing the bulk with the sample; and
- (c) that the goods will be free from any defect rendering them unmerchantable that would not be apparent on reasonable examination of the sample. R.S.O. 1970, c. 421, s. 16.

PART II

EFFECTS OF THE CONTRACT

Goods must be ascertained

17. Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer until the goods are ascertained. R.S.O. 1970, c. 421, s. 17.

Property passes where intended to pass

18.—(1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

Ascertaining intention

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. R.S.O. 1970, c. 421, s. 18.

Rules for ascertaining intention

19. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

Rule 1.—Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the

contract is made and it is immaterial whether the time of payment or the time of delivery or both is postponed.

Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof.

Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof.

Rule 4.—When goods are delivered to the buyer on approval or “on sale or return” or other similar terms, the property therein passes to the buyer;

- (i) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;
- (ii) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time, and what is a reasonable time is a question of fact.

Rule 5.—(i) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer, and such assent may be expressed or implied and may be given either before or after the appropriation is made.

- (ii) Where in pursuance of the contract the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer and does not reserve

the right of disposal, he shall be deemed to have unconditionally appropriated the goods to the contract. R.S.O. 1970, c. 421, s. 19.

Reservation
of right of
disposal

20.—(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled, and in such case, notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller have been fulfilled.

Goods
deliverable to
order of seller

(2) Where goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller *prima facie* reserves the right of disposal.

Where seller
draws on
buyer and
sends draft
with bill of
lading

(3) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he unlawfully retains the bill of lading, the property in the goods does not pass to him. R.S.O. 1970, c. 421, s. 20.

Risk
prima facie
passes with
property

21. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but, when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not, but,

- (a) where delivery has been delayed through the fault of either the buyer or seller, the goods are at the risk of the party in fault as regards any loss that might not have occurred but for such fault; and
- (b) nothing in this section affects the duties or liabilities of either seller or buyer as a bailee of the goods of the other party. R.S.O. 1970, c. 421, s. 21.

Sale by person
other than
owner

22. Subject to this Act, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell but nothing in this Act affects,

R.S.O. 1970,
c. 156

- (a) *The Factors Act* or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof; or
- (b) the validity of any contract of sale under any special

common law or statutory power of sale or under the order of a court of competent jurisdiction. R.S.O. 1970, c. 421, s. 22.

23. The law relating to market overt does not apply to a sale of goods that takes place in Ontario. R.S.O. 1970, c. 421, s. 23.

Law as to market overt does not apply

24. When the seller of goods has a voidable title thereto but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, if he buys them in good faith and without notice of the seller's defective title. R.S.O. 1970, c. 421, s. 24.

Sale under voidable title

25.—(1) Where a person having sold goods continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under a sale, pledge or other disposition thereof to a person receiving the goods or documents of title in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the delivery or transfer.

Seller in possession after sale

(2) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under a sale, pledge or other disposition thereof to a person receiving the goods or documents of title in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

Buyer in possession after sale

(3) Subject to subsection 5, subsection 2 does not apply to goods the possession of which has been obtained by a buyer under a security agreement whereby the seller retains a security interest within the meaning of *The Personal Property Security Act*, and the rights of the parties shall be determined by that Act.

Security interests excepted

R.S.O. 1970, c. 344

(4) In this section, "mercantile agent" means a mercantile agent having, in the customary course of his business as such agent, authority either to sell goods or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.

Interpretation

(5) Subsection 3 comes into force on a day to be named by the Lieutenant Governor by his proclamation. R.S.O. 1970, c. 421, s. 25.

Commencement of subs. 3

PART III

PERFORMANCE OF THE CONTRACT

Duties of
seller and
buyer

26. It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract of sale. R.S.O. 1970, c. 421, s. 26.

Payment
and delivery
concurrent

27. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer shall be ready and willing to pay the price in exchange for possession of the goods. R.S.O. 1970, c. 421, s. 27.

Rules as to
delivery

28.—(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties, and apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he has one, and if not, his residence, but where the contract is for the sale of specific goods that to the knowledge of the parties, when the contract is made, are in some other place, then that place is the place of delivery.

Where no
time for
delivery fixed

(2) Where under the contract of sale the seller is bound to send the goods to the buyer but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

Where goods
in possession
of third person

(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by the seller to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf, but nothing in this section affects the operation of the issue or transfer of any document of title to goods.

Demand or
tender of
delivery

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour, and what is a reasonable hour is a question of fact.

Expenses of
putting goods
in deliverable
state

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods in a deliverable state shall be borne by the seller. R.S.O. 1970, c. 421, s. 28.

Delivery
of wrong
quantity

29.—(1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered, he shall pay for them at the contract rate.

Where quantity
larger than
contracted for

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he

may reject the whole, and if the buyer accepts the whole of the goods so delivered, he shall pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods that are in accordance with the contract and reject the rest, or he may reject the whole.

Goods not in accordance with contract

(4) This section is subject to any usage of trade, special agreement or course of dealing between the parties. R.S.O. 1970, c. 421, s. 29.

Exceptions as to trade customs, etc.

30.—(1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

Delivery by instalments

(2) Where there is a contract for the sale of goods to be delivered by stated instalments that are to be separately paid for and the seller makes defective deliveries in respect of one or more instalments or fails to deliver one or more instalments or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated. R.S.O. 1970, c. 421, s. 30.

Where instalments are not delivered as contracted for

31.—(1) Where in pursuance of a contract of sale the seller is authorized or required to send the goods to the buyer, the delivery of the goods to a carrier whether named by the buyer or not, for the purpose of transmission to the buyer, is *prima facie* a delivery of the goods to the buyer.

Delivery to carrier

(2) Unless otherwise authorized by the buyer, the seller shall make a contract with the carrier on behalf of the buyer that is reasonable having regard to the nature of the goods and the other circumstances of the case, and if the seller omits so to do and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself or may hold the seller responsible in damages. R.S.O. 1970, c. 421, s. 31.

Seller's contract with carrier

32. Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer nevertheless, unless otherwise agreed, takes any risk of deterioration in the goods necessarily incident to the course of transit. R.S.O. 1970, c. 421, s. 32.

Agreement for delivery elsewhere than at place of sale

33.—(1) Where goods are delivered to the buyer that he has not previously examined, he shall be deemed not to have

Rights of buyer as to examination

accepted them until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

Seller to afford opportunity for examination

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he shall, on request, afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract. R.S.O. 1970, c. 421, s. 33.

Acceptance of goods

34. The buyer shall be deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them that is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them. R.S.O. 1970, c. 421, s. 34.

Effect of refusal to accept

35. Unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them. R.S.O. 1970, c. 421, s. 35.

Wrongful neglect or refusal to take delivery

36. When the seller is ready and willing to deliver the goods and requests the buyer to take delivery and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods, but nothing in this section affects the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract. R.S.O. 1970, c. 421, s. 36.

PART IV

RIGHTS OF UNPAID SELLER AGAINST THE GOODS

Interpretation

37.—(1) The seller of goods shall be deemed to be an “unpaid seller” within the meaning of this Act,

- (a) when the whole of the price has not been paid or tendered;
- (b) when a bill of exchange or other negotiable instrument has been received as conditional payment and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

Idem

(2) In this Part “seller” includes a person who is in the position of a seller, as for instance an agent of the seller to whom the bill of lading has been endorsed, or a consignor or

agent who has himself paid or is directly responsible for the price. R.S.O. 1970, c. 421, s. 37.

38.—(1) Subject to this Act and any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law, Rights of unpaid seller

- (a) a lien on the goods or right to retain them for the price while he is in possession of them;
- (b) in case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them;
- (c) a right of resale as limited by this Act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with the rights of lien and stoppage in transitu where the property has passed to the buyer. R.S.O. 1970, c. 421, s. 38. Withholding delivery

39.—(1) Subject to this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price, Unpaid seller's lien

- (a) where the goods have been sold without any stipulation as to credit;
- (b) where the goods have been sold on credit but the term of credit has expired; or
- (c) where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer. R.S.O. 1970, c. 421, s. 39. Seller in possession as agent

40. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder unless the part delivery has been made under such circumstances as show an agreement to waive the lien or right of retention. R.S.O. 1970, c. 421, s. 40. Where part delivery has been made

41.—(1) The unpaid seller of goods loses his lien or right of retention thereon, Termination of lien

- (a) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods;
- (b) when the buyer or his agent lawfully obtains possession of the goods; or
- (c) by waiver thereof.

Lien not lost by obtaining judgment for price	(2) The unpaid seller of goods having a lien or right of retention thereon does not lose his lien or right of retention by reason only that he has obtained judgment for the price of the goods. R.S.O. 1970, c. 421, s. 41.
Right of stoppage in transitu	42. Subject to this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price. R.S.O. 1970, c. 421, s. 42.
Duration of transit	43.— (1) Goods shall be deemed to be in course of transit from the time they are delivered to a carrier by land or water or other bailee for the purpose of transmission to the buyer until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee.
Buyer obtaining delivery	(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination the transit is at an end.
Carrier holding goods to buyer's order	(3) If after the arrival of the goods at the appointed destination the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent, the transit is at an end and it is immaterial that a further destination for the goods may have been indicated by the buyer.
Rejected goods	(4) If the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, the transit shall be deemed not to be at an end even if the seller has refused to receive them back.
Ship chartered by buyer	(5) When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case whether they are in the possession of the master as a carrier or as agent to the buyer.
Wrongful refusal to deliver	(6) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit shall be deemed to be at an end.
Where part delivery has been made	(7) Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transitu unless the part delivery has been made under such circumstances as show an agreement to give up possession of the whole of the goods. R.S.O. 1970, c. 421, s. 43.
How right may be exercised	44.— (1) The unpaid seller may exercise his right of stoppage in transitu either by taking actual possession of the goods or by giving notice of his claim to the carrier or other bailee

in whose possession the goods are, and such notice may be given either to the person in actual possession of the goods or to his principal, and in the latter case the notice to be effectual shall be given at such time and under such circumstances that the principal by the exercise of reasonable diligence may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2) When notice of stoppage in transitu is given by the seller to the carrier or other bailee in possession of the goods, he shall redeliver the goods to or according to the directions of the seller, and the expenses of such redelivery shall be borne by the seller. R.S.O. 1970, c. 421, s. 44.

Redelivery
after notice
to carrier, etc.

45. Subject to this Act, the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale or other disposition of the goods that the buyer may have made, unless the seller has assented thereto, but where a document of title to goods has been lawfully transferred to a person as buyer or owner of the goods and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if the last-mentioned transfer was by way of sale, the unpaid seller's right of lien or retention or stoppage in transitu is defeated, and if the last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transitu can only be exercised subject to the rights of the transferee. R.S.O. 1970, c. 421, s. 45.

Effect of
subsale or
pledge by
buyer

46.—(1) Subject to this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transitu.

Exercise of
right of lien or
stoppage, effect
on contract

(2) Where an unpaid seller who has exercised his right of lien or retention or stoppage in transitu resells the goods, the buyer acquires a good title thereto as against the original buyer.

Title of buyer
on resale

(3) Where the goods are of a perishable nature or where the unpaid seller gives notice to the buyer of his intention to resell and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

Resale and
right to
damages for
breach of
contract

(4) Where the seller expressly reserves a right of resale in case the buyer should make default, and on the buyer making default, resells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages. R.S.O. 1970, c. 421, s. 46.

Where resale
rescinds
contract

PART V

ACTIONS FOR BREACH OF THE CONTRACT

Seller may maintain action for price

47.—(1) Where, under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

Where property in goods has not passed

(2) Where under a contract of sale the price is payable on a day certain, irrespective of delivery, and the buyer wrongfully neglects or refuses to pay the price, the seller may maintain an action for the price although the property in the goods has not passed and the goods have not been appropriated to the contract. R.S.O. 1970, c. 421, s. 47.

Action for non-acceptance

48.—(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

Measure of damages

(2) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the buyer's breach of contract.

Difference in price

(3) Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept. R.S.O. 1970, c. 421, s. 48.

Buyer may maintain action for non-delivery

49.—(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

Measure of damages

(2) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract.

Difference in price

(3) Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver. R.S.O. 1970, c. 421, s. 49.

Specific performance

50. In an action for breach of contract to deliver specific or ascertained goods, the court may, if it thinks fit, direct that the contract be performed specifically, without giving the defendant the option of retaining the goods on payment of

damages, and may impose such terms and conditions as to damages, payment of the price, and otherwise, as to the court seems just. R.S.O. 1970, c. 421, s. 50.

51.—(1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat a breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods, but he may,

Breach of warranty

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) maintain an action against the seller for damages for the breach of warranty.

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty.

Measure of damages

(3) In the case of breach of warranty of quality, such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

Breach of warranty as to quality

(4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage. R.S.O. 1970, c. 421, s. 51.

Right of action

52. Nothing in this Act affects the right of the buyer or the seller to recover interest or special damages in a case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed. R.S.O. 1970, c. 421, s. 52.

Other rights of buyer preserved

PART VI

SUPPLEMENTARY

53. Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract. R.S.O. 1970, c. 421, s. 53.

Exclusion of implied laws and conditions

54. Where by this Act any reference is made to a “reasonable time”, the question of what is a reasonable time is a question of fact. R.S.O. 1970, c. 421, s. 54.

Reasonable time a question of fact

55. Where any right, duty or liability is declared by this Act, it may, unless otherwise provided by this Act, be enforced by action. R.S.O. 1970, c. 421, s. 55.

Rights enforceable by action

Sales by
auction

56. In case of a sale by auction,

- (a) where goods are put up for sale in lots, each lot is *prima facie* the subject of a separate contract of sale;
- (b) a sale is complete when the auctioneer announces its completion by the fall of a hammer or in any other customary manner, and until such announcement is made any bidder may retract his bid;
- (c) where a sale is not notified to be subject to a right to bid on behalf of the seller, it is not lawful for the seller to bid himself or to employ a person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person, and any sale contravening this rule may be treated as fraudulent by the buyer;
- (d) a sale may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller;
- (e) where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction. R.S.O. 1970, c. 421, s. 56.

Application
of common
law and law
merchant

57.—(1) The rules of the common law, including the law merchant, except in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake or other invalidating cause, continue to apply to contracts for the sale of goods.

Bills of sale,
etc., not
affected

(2) Nothing in this Act affects enactments relating to conditional sales, bills of sale or chattel mortgages.

Act not to
apply to
mortgages,
etc.

(3) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale that is intended to operate by way of mortgage, pledge, charge or other security. R.S.O. 1970, c. 421, s. 57.

APPENDIX 3

SELECTED PROVISIONS OF ARTICLE 1 (GENERAL PROVISIONS) OF THE UNIFORM COMMERCIAL CODE 1972 OFFICIAL TEXT*

§ 1—102. Purposes; Rules of Construction; Variation by Agreement

(1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.

. . .

(3) The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

§ 1—103. Supplementary General Principles of Law Applicable

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

§ 1—201. General Definitions

Subject to additional definitions contained in the subsequent Articles of this Act which are applicable to specific Articles or Parts thereof, and unless the context otherwise requires, in this Act:

(1) “Action” in the sense of a judicial proceeding includes recoupment, counterclaim, set-off, suit in equity and any other proceedings in which rights are determined.

. . .

(3) “Agreement” means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this

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Act (Sections 1—205 and 2—208). Whether an agreement has legal consequences is determined by the provisions of this Act, if applicable; otherwise by the law of contracts (Section 1—103). (Compare “Contract”.)

. . .

(6) “Bill of lading” means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and includes an airbill. “Airbill” means a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air waybill.

. . .

(9) “Buyer in ordinary course of business” means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. All persons who sell minerals or the like (including oil and gas) at wellhead or minehead shall be deemed to be persons in the business of selling goods of that kind. “Buying” may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

. . .

(11) “Contract” means the total legal obligation which results from the parties’ agreement as affected by this Act and any other applicable rules of law. (Compare “Agreement”.)

. . .

(16) “Fault” means wrongful act, omission or breach.

(17) “Fungible” with respect to goods or securities means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Goods which are not fungible shall be deemed fungible for the purposes of this Act to the extent that under a particular agreement or document unlike units are treated as equivalents.

. . .

(19) “Good faith” means honesty in fact in the conduct or transaction concerned.

. . .

(23) A person is “insolvent” who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law.

. . .

(26) A person “notifies” or “gives” a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person “receives” a notice or notification when

- (a) it comes to his attention; or
- (b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.

. . .

(37) “Security interest” means an interest in personal property or fixtures which secures payment or performance of an obligation. . . .

. . .

(39) “Signed” includes any symbol executed or adopted by a party with present intention to authenticate a writing.

§ 1—203. **Obligation of Good Faith**

Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.

§ 1—204. **Time; Reasonable Time; “Seasonably”**

(1) Whenever this Act requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement.

(2) What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.

(3) An action is taken “seasonably” when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time.

§ 1—205. **Course of Dealing and Usage of Trade**

(1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(2) A usage of trade is any practice or method of dealing having such

regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

(3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

(4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

(5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

APPENDIX 4

ARTICLE 2 OF THE UNIFORM COMMERCIAL CODE (AS AMENDED) 1972 OFFICIAL TEXT*

SALES

PART 1. SHORT TITLE, GENERAL CONSTRUCTION AND SUBJECT MATTER

Section

- 2—101. Short Title.
- 2—102. Scope; Certain Security and Other Transactions Excluded From This Article.
- 2—103. Definitions and Index of Definitions.
- 2—104. Definitions: "Merchant"; "Between Merchants"; "Financing Agency".
- 2—105. Definitions: Transferability; "Goods"; "Future" Goods; "Lot"; "Commercial Unit".
- 2—106. Definitions: "Contract"; "Agreement"; "Contract for Sale"; "Sale"; "Present Sale"; "Conforming" to Contract; "Termination"; "Cancellation".
- 2—107. Goods to Be Severed From Realty: Recording.

PART 2. FORM, FORMATION AND READJUSTMENT OF CONTRACT

- 2—201. Formal Requirements; Statute of Frauds.
- 2—202. Final Written Expression: Parol or Extrinsic Evidence.
- 2—203. Seals Inoperative.
- 2—204. Formation in General.
- 2—205. Firm Offers.
- 2—206. Offer and Acceptance in Formation of Contract.
- 2—207. Additional Terms in Acceptance or Confirmation.
- 2—208. Course of Performance or Practical Construction.
- 2—209. Modification, Rescission and Waiver.
- 2—210. Delegation of Performance; Assignment of Rights.

PART 3. GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

- 2—301. General Obligations of Parties.
- 2—302. Unconscionable Contract or Clause.
- 2—303. Allocation or Division of Risks.
- 2—304. Price Payable in Money, Goods, Realty, or Otherwise.
- 2—305. Open Price Term.

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- 2—306. Output, Requirements and Exclusive Dealings.
- 2—307. Delivery in Single Lot or Several Lots.
- 2—308. Absence of Specified Place for Delivery.
- 2—309. Absence of Specific Time Provisions; Notice of Termination.
- 2—310. Open Time for Payment or Running of Credit; Authority to Ship Under Reservation.
- 2—311. Options and Cooperation Respecting Performance.
- 2—312. Warranty of Title and Against Infringement; Buyer's Obligation Against Infringement.
- 2—313. Express Warranties by Affirmation, Promise, Description, Sample.
- 2—314. Implied Warranty: Merchantability; Usage of Trade.
- 2—315. Implied Warranty: Fitness for Particular Purpose.
- 2—316. Exclusion or Modification of Warranties.
- 2—317. Cumulation and Conflict of Warranties Express or Implied.
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- 2—319. F.O.B. and F.A.S. Terms.
- 2—320. C.I.F. and C. & F. Terms.
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- 2—322. Delivery "Ex-Ship".
- 2—323. Form of Bill of Lading Required in Overseas Shipment; "Over-seas".
- 2—324. "No Arrival, No Sale" Term.
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- 2—326. Sale on Approval and Sale or Return; Consignment Sales and Rights of Creditors.
- 2—327. Special Incidents of Sale on Approval and Sale Or Return.
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- 2—713. Buyer's Damages for Non-Delivery or Repudiation.
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- 2—720. Effect of “Cancellation” or “Rescission” on Claims for Antecedent Breach.
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PART 1

SHORT TITLE, GENERAL CONSTRUCTION AND SUBJECT MATTER

§ 2—101. Short Title

This Article shall be known and may be cited as Uniform Commercial Code—Sales.

§ 2—102. Scope; Certain Security and Other Transactions Excluded From This Article

Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

§ 2—103. Definitions and Index of Definitions

(1) In this Article unless the context otherwise requires

- (a) “Buyer” means a person who buys or contracts to buy goods.
- (b) “Good faith” in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.
- (c) “Receipt” of goods means taking physical possession of them.
- (d) “Seller” means a person who sells or contracts to sell goods.

(2) Other definitions applying to this Article or to specified Parts thereof, and the sections in which they appear are:

“Acceptance”. Section 2—606.

“Banker’s credit”. Section 2—325.

“Between merchants”. Section 2—104.

“Cancellation”. Section 2—106(4).

- "Commercial unit". Section 2—105.
- "Confirmed credit". Section 2—325.
- "Conforming to contract". Section 2—106.
- "Contract for sale". Section 2—106.
- "Cover". Section 2—712.
- "Entrusting". Section 2—403.
- "Financing agency". Section 2—104.
- "Future goods". Section 2—105.
- "Goods". Section 2—105.
- "Identification". Section 2—501.
- "Installment contract". Section 2—612.
- "Letter of Credit". Section 2—325.
- "Lot". Section 2—105.
- "Merchant". Section 2—104.
- "Overseas". Section 2—323.
- "Person in position of seller". Section 2—707.
- "Present sale". Section 2—106.
- "Sale". Section 2—106.
- "Sale on approval". Section 2—326.
- "Sale or return". Section 2—326.
- "Termination". Section 2—106.

(3) The following definitions in other Articles apply to this Article:

- "Check". Section 3—104.
- "Consignee". Section 7—102.
- "Consignor". Section 7—102.
- "Consumer goods". Section 9—109.
- "Dishonor". Section 3—507.
- "Draft". Section 3—104.

(4) In addition Article 1 contains general definitions and principles of construction and interpretation applicable throughout this Article.

§ 2—104. Definitions: "Merchant"; "Between Merchants"; "Financing Agency"

(1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

(2) "Financing agency" means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller's draft or making advances against it or by merely taking it for collection whether or not documents of title accompany the draft. "Financing ag-

ency" includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (Section 2—707).

(3) "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

§ 2—105. Definitions: Transferability; "Goods"; "Future" Goods; "Lot"; "Commercial Unit"

(1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2—107).

(2) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are "future" goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

(3) There may be a sale of a part interest in existing identified goods.

(4) An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common.

(5) "Lot" means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract.

(6) "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

§ 2—106. Definitions: "Contract"; "Agreement"; "Contract for Sale"; "Sale"; "Present Sale"; "Conforming" to Contract; "Termination"; "Cancellation"

(1) In this Article unless the context otherwise requires "contract" and "agreement" are limited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a

contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price (Section 2—401). A "present sale" means a sale which is accomplished by the making of the contract.

(2) Goods or conduct including any part of a performance are "conforming" or conform to the contract when they are in accordance with the obligations under the contract.

(3) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

(4) "Cancellation" occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of "termination" except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance.

§ 2—107. Goods to Be Severed From Realty: Recording

(1) A contract for the sale of minerals or the like (including oil and gas) or a structure or its materials to be removed from realty is a contract for the sale of goods within this Article if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

(2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) or of timber to be cut is a contract for the sale of goods within this Article whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

(3) The provisions of this section are subject to any third party rights provided by the law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale. As amended 1972.

PART 2

FORM, FORMATION AND READJUSTMENT OF CONTRACT

§ 2—201. Formal Requirements; Statute of Frauds

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party

against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

- (a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or
- (b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or
- (c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Sec. 2—606).

§ 2—202. Final Written Expression: Parol or Extrinsic Evidence

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

- (a) by course of dealing or usage of trade (Section 1—205) or by course of performance (Section 2—208); and
- (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

§ 2—203. Seals Inoperative

The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer.

§ 2—204. Formation in General

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

§ 2—205. Firm Offers

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

§ 2—206. Offer and Acceptance in Formation of Contract

(1) Unless otherwise unambiguously indicated by the language or circumstances

(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;

(b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

(2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

§ 2—207. Additional Terms in Acceptance or Confirmation

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition

to the contract. Between merchants such terms become part of the contract unless:

- (a) the offer expressly limits acceptance to the terms of the offer;
- (b) they materially alter it; or
- (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

§ 2—208. Course of Performance or Practical Construction

(1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (Section 1—205).

(3) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

§ 2—209. Modification, Rescission and Waiver

(1) An agreement modifying a contract within this Article needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this Article (Section 2—201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of

the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

§ 2—210. Delegation of Performance; Assignment of Rights

(1) A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.

(2) Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise.

(3) Unless the circumstances indicate the contrary a prohibition of assignment of "the contract" is to be construed as barring only the delegation to the assignee of the assignor's performance.

(4) An assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract.

(5) The other party may treat any assignment which delegates performance as creating reasonable grounds for insecurity and may without prejudice to his rights against the assignor demand assurances from the assignee (Section 2—609).

PART 3

GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

§ 2—301. General Obligations of Parties

The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract.

§ 2—302. Unconscionable Contract or Clause

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the

contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

§ 2—303. Allocation or Division of Risks

Where this Article allocates a risk or a burden as between the parties “unless otherwise agreed”, the agreement may not only shift the allocation but may also divide the risk or burden.

§ 2—304. Price Payable in Money, Goods, Realty, or Otherwise

(1) The price can be made payable in money or otherwise. If it is payable in whole or in part in goods each party is a seller of the goods which he is to transfer.

(2) Even though all or part of the price is payable in an interest in realty the transfer of the goods and the seller’s obligations with reference to them are subject to this Article, but not the transfer of the interest in realty or the transferor’s obligations in connection therewith.

§ 2—305. Open Price Term

(1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if

(a) nothing is said as to price; or

(b) the price is left to be agreed by the parties and they fail to agree; or

(c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

(2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.

(3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.

(4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

§ 2—306. Output, Requirements and Exclusive Dealings

(1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

(2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

§ 2—307. Delivery in Single Lot or Several Lots

Unless otherwise agreed all goods called for by a contract for sale must be tendered in a single delivery and payment is due only on such tender but where the circumstances give either party the right to make or demand delivery in lots the price if it can be apportioned may be demanded for each lot.

§ 2—308. Absence of Specified Place for Delivery

Unless otherwise agreed

- (a) the place for delivery of goods is the seller's place of business or if he has none his residence; but
- (b) in a contract for sale of identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery; and
- (c) documents of title may be delivered through customary banking channels.

§ 2—309. Absence of Specific Time Provisions; Notice of Termination

(1) The time for shipment or delivery or any other action under a contract if not provided in this Article or agreed upon shall be a reasonable time.

(2) Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.

(3) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

§ 2—310. Open Time for Payment or Running of Credit; Authority to Ship Under Reservation

Unless otherwise agreed

- (a) payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and
- (b) if the seller is authorized to send the goods he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (Section 2—513); and
- (c) if delivery is authorized and made by way of documents of title otherwise than by subsection (b) then payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received; and
- (d) where the seller is required or authorized to ship the goods on credit the credit period runs from the time of shipment but post-dating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period.

§ 2—311. Options and Cooperation Respecting Performance

(1) An agreement for sale which is otherwise sufficiently definite (subsection (3) of Section 2—204) to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.

(2) Unless otherwise agreed specifications relating to assortment of the goods are at the buyer's option and except as otherwise provided in subsections (1)(c) and (3) of Section 2—319 specifications or arrangements relating to shipment are at the seller's option.

(3) Where such specification would materially affect the other party's performance but is not seasonably made or where one party's cooperation is necessary to the agreed performance of the other but is not seasonably forthcoming, the other party in addition to all other remedies

- (a) is excused for any resulting delay in his own performance; and
- (b) may also either proceed to perform in any reasonable manner or after the time for a material part of his own performance treat the failure to specify or to cooperate as a breach by failure to deliver or accept the goods.

§ 2—312. Warranty of Title and Against Infringement; Buyer's Obligation Against Infringement

(1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that

- (a) the title conveyed shall be good, and its transfer rightful; and
- (b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

(3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

§ 2—313. Express Warranties by Affirmation, Promise, Description, Sample

(1) Express warranties by the seller are created as follows:

- (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
- (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
- (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

§ 2—314. Implied Warranty: Merchantability; Usage of Trade

(1) Unless excluded or modified (Section 2—316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

- (a) pass without objection in the trade under the contract description; and

- (b) in the case of fungible goods, are of fair average quality within the description; and
- (c) are fit for the ordinary purposes for which such goods are used; and
- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- (e) are adequately contained, packaged, and labeled as the agreement may require; and
- (f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2—316) other implied warranties may arise from course of dealing or usage of trade.

§ 2—315. Implied Warranty: Fitness for Particular Purpose

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

§ 2—316. Exclusion or Modification of Warranties

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2—202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

- (a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
- (b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has

refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

- (c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2—718 and 2—719).

§ 2—317. Cumulation and Conflict of Warranties Express or Implied

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:

- (a) Exact or technical specifications displace an inconsistent sample or model or general language of description.
- (b) A sample from an existing bulk displaces inconsistent general language of description.
- (c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

§ 2—318. Third Party Beneficiaries of Warranties Express or Implied

NOTE: If this Act is introduced in the Congress of the United States this section should be omitted. (States to select one alternative.)

Alternative A

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative B

A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative C

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not ex-

clude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends. As amended 1966.

§ 2—319. F.O.B. and F.A.S. Terms

(1) Unless otherwise agreed the term F.O.B. (which means “free on board”) at a named place, even though used only in connection with the stated price, is a delivery term under which

- (a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this Article (Section 2—504) and bear the expense and risk of putting them into the possession of the carrier; or
- (b) when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this Article (Section 2—503);
- (c) when under either (a) or (b) the term is also F.O.B. vessel, car or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is F.O.B. vessel the buyer must name the vessel and in an appropriate case the seller must comply with the provisions of this Article on the form of bill of lading (Section 2—323).

(2) Unless otherwise agreed the term F.A.S. vessel (which means “free alongside”) at a named port, even though used only in connection with the stated price, is a delivery term under which the seller must

- (a) at his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer; and
- (b) obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.

(3) Unless otherwise agreed in any case falling within subsection (1)(a) or (c) or subsection (2) the buyer must seasonably give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B. the loading berth of the vessel and in an appropriate case its name and sailing date. The seller may treat the failure of needed instructions as a failure of cooperation under this Article (Section 2—311). He may also at his option move the goods in any reasonable manner preparatory to delivery or shipment.

(4) Under the term F.O.B. vessel or F.A.S. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

§ 2—320. C.I.F. and C. & F. Terms

(1) The term C.I.F. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination. The term C. & F. or C.F. means that the price so includes cost and freight to the named destination.

(2) Unless otherwise agreed and even though used only in connection with the stated price and destination, the term C.I.F. destination or its equivalent requires the seller at his own expense and risk to

- (a) put the goods into the possession of a carrier at the port for shipment and obtain a negotiable bill or bills of lading covering the entire transportation to the named destination; and
- (b) load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight has been paid or provided for; and
- (c) obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern; but the seller may add to the price the amount of the premium for any such war risk insurance; and
- (d) prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and
- (e) forward and tender with commercial promptness all the documents in due form and with any indorsement necessary to perfect the buyer's rights.

(3) Unless otherwise agreed the term C. & F. or its equivalent has the same effect and imposes upon the seller the same obligations and risks as a C.I.F. term except the obligation as to insurance.

(4) Under the term C.I.F. or C. & F. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

§ 2—321. C.I.F. or C. & F.: "Net Landed Weights"; "Payment on Arrival"; Warranty of Condition on Arrival

Under a contract containing a term C.I.F. or C. & F.

(1) Where the price is based on or is to be adjusted according to "net landed weights", "delivered weights", "out turn" quantity or quality or the like, unless otherwise agreed the seller must reasonably estimate the price. The payment due on tender of the documents called for by the

contract is the amount so estimated, but after final adjustment of the price a settlement must be made with commercial promptness.

(2) An agreement described in subsection (1) or any warranty of quality or condition of the goods on arrival places upon the seller the risk of ordinary deterioration, shrinkage and the like in transportation but has no effect on the place or time of identification to the contract for sale or delivery or on the passing of the risk of loss.

(3) Unless otherwise agreed where the contract provides for payment on or after arrival of the goods the seller must before payment allow such preliminary inspection as is feasible; but if the goods are lost delivery of the documents and payment are due when the goods should have arrived.

§ 2—322. Delivery “Ex-Ship”

(1) Unless otherwise agreed a term for delivery of goods “ex-ship” (which means from the carrying vessel) or in equivalent language is not restricted to a particular ship and requires delivery from a ship which has reached a place at the named port of destination where goods of the kind are usually discharged.

(2) Under such a term unless otherwise agreed

- (a) the seller must discharge all liens arising out of the carriage and furnish the buyer with a direction which puts the carrier under a duty to deliver the goods; and
- (b) the risk of loss does not pass to the buyer until the goods leave the ship’s tackle or are otherwise properly unloaded.

§ 2—323. Form of Bill of Lading Required in Overseas Shipment; “Overseas”

(1) Where the contract contemplates overseas shipment and contains a term C.I.F. or C. & F. or F.O.B. vessel, the seller unless otherwise agreed must obtain a negotiable bill of lading stating that the goods have been loaded on board or, in the case of a term C.I.F. or C. & F., received for shipment.

(2) Where in a case within subsection (1) a bill of lading has been issued in a set of parts, unless otherwise agreed if the documents are not to be sent from abroad the buyer may demand tender of the full set; otherwise only one part of the bill of lading need be tendered. Even if the agreement expressly requires a full set

- (a) due tender of a single part is acceptable within the provisions of this Article on cure of improper delivery (subsection (1) of Section 2—508); and
- (b) even though the full set is demanded, if the documents are sent from abroad the person tendering an incomplete set may never-

theless require payment upon furnishing an indemnity which the buyer in good faith deems adequate.

(3) A shipment by water or by air or a contract contemplating such shipment is "overseas" insofar as by usage of trade or agreement it is subject to the commercial, financing or shipping practices characteristic of international deep water commerce.

§ 2—324. "No Arrival, No Sale" Term

Under a term "no arrival, no sale" or terms of like meaning, unless otherwise agreed,

- (a) the seller must properly ship conforming goods and if they arrive by any means he must tender them on arrival but he assumes no obligation that the goods will arrive unless he has caused the non-arrival; and
- (b) where without fault of the seller the goods are in part lost or have so deteriorated as no longer to conform to the contract or arrive after the contract time, the buyer may proceed as if there had been casualty to identified goods (Section 2—613).

§ 2—325. "Letter of Credit" Term; "Confirmed Credit"

(1) Failure of the buyer seasonably to furnish an agreed letter of credit is a breach of the contract for sale.

(2) The delivery to seller of a proper letter of credit suspends the buyer's obligation to pay. If the letter of credit is dishonored, the seller may on seasonable notification to the buyer require payment directly from him.

(3) Unless otherwise agreed the term "letter of credit" or "banker's credit" in a contract for sale means an irrevocable credit issued by a financing agency of good repute and, where the shipment is overseas, of good international repute. The term "confirmed credit" means that the credit must also carry the direct obligation of such an agency which does business in the seller's financial market.

§ 2—326. Sale on Approval and Sale or Return; Consignment Sales and Rights of Creditors

(1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is

- (a) a "sale on approval" if the goods are delivered primarily for use, and
- (b) a "sale or return" if the goods are delivered primarily for resale.

(2) Except as provided in subsection (3), goods held on approval are not subject to the claims of the buyer's creditors until acceptance; goods

held on sale or return are subject to such claims while in the buyer's possession.

(3) Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. The provisions of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as "on consignment" or "on memorandum". However, this subsection is not applicable if the person making delivery

- (a) complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign; or
- (b) establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others, or
- (c) complies with the filing provisions of the Article on Secured Transactions (Article 9).

(4) Any "or return" term of a contract for sale is to be treated as a separate contract for sale within the statute of frauds section of this Article (Section 2—201) and as contradicting the sale aspect of the contract within the provisions of this Article on parol or extrinsic evidence (Section 2—202).

§ 2—327. Special Incidents of Sale on Approval and Sale or Return

(1) Under a sale on approval unless otherwise agreed

- (a) although the goods are identified to the contract the risk of loss and the title do not pass to the buyer until acceptance; and
- (b) use of the goods consistent with the purpose of trial is not acceptance but failure seasonably to notify the seller of election to return the goods is acceptance, and if the goods conform to the contract acceptance of any part is acceptance of the whole; and
- (c) after due notification of election to return, the return is at the seller's risk and expense but a merchant buyer must follow any reasonable instructions.

(2) Under a sale or return unless otherwise agreed

- (a) the option to return extends to the whole or any commercial unit of the goods while in substantially their original condition, but must be exercised seasonably; and
- (b) the return is at the buyer's risk and expense.

§ 2—328. Sale by Auction

(1) In a sale by auction if goods are put up in lots each lot is the subject of a separate sale.

(2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid the auctioneer may in his discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling.

(3) Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

(4) If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the buyer may at his option avoid the sale or take the goods at the price of the last good faith bid prior to the completion of the sale. This subsection shall not apply to any bid at a forced sale.

PART 4

TITLE, CREDITORS AND GOOD FAITH PURCHASERS

§ 2—401. Passing of Title; Reservation for Security; Limited Application of This Section

Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this Article and matters concerning title become material the following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (Section 2—501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this Act. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the Article on Secured Transactions (Article 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with refer-

ence to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading

(a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(b) if the contract requires delivery at destination, title passes on tender there.

(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,

(a) if the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or

(b) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance re-vests title to the goods in the seller. Such re-vesting occurs by operation of law and is not a "sale".

§ 2—402. Rights of Seller's Creditors Against Sold Goods

(1) Except as provided in subsections (2) and (3), rights of unsecured creditors of the seller with respect to goods which have been identified to a contract for sale are subject to the buyer's rights to recover the goods under this Article (Sections 2—502 and 2—716).

(2) A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if as against him a retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated, except that retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent.

(3) Nothing in this Article shall be deemed to impair the rights of creditors of the seller

(a) under the provisions of the Article on Secured Transactions (Article 9); or

(b) where identification to the contract or delivery is made not in current course of trade but in satisfaction of or as security for a pre-existing claim for money, security or the like and is made under circumstances which under any rule of law of the state where the goods are situated would apart from this Article constitute the transaction a fraudulent transfer or voidable preference.

§ 2—403. Power to Transfer; Good Faith Purchase of Goods; “Entrusting”

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

- (a) the transferor was deceived as to the identity of the purchaser, or
- (b) the delivery was in exchange for a check which is later dishonored, or
- (c) it was agreed that the transaction was to be a “cash sale”, or
- (d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) “Entrusting” includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor’s disposition of the goods have been such as to be larcenous under the criminal law.

(4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk Transfers (Article 6) and Documents of Title (Article 7).

PART 5

PERFORMANCE

§ 2—501. Insurable Interest in Goods; Manner of Identification of Goods

(1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are non-conforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs

- (a) when the contract is made if it is for the sale of goods already existing and identified;
- (b) if the contract is for the sale of future goods other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;

(c) when the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve months after contracting or for the sale of crops to be harvested within twelve months or the next normal harvest season after contracting whichever is longer.

(2) The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him and where the identification is by the seller alone he may until default or insolvency or notification to the buyer that the identification is final substitute other goods for those identified.

(3) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.

§ 2—502. Buyer's Right to Goods on Seller's Insolvency

(1) Subject to subsection (2) and even though the goods have not been shipped a buyer who has paid a part or all of the price of goods in which he has a special property under the provisions of the immediately preceding section may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if the seller becomes insolvent within ten days after receipt of the first installment on their price.

(2) If the identification creating his special property has been made by the buyer he acquires the right to recover the goods only if they conform to the contract for sale.

§ 2—503. Manner of Seller's Tender of Delivery

(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time and place for tender are determined by the agreement and this Article, and in particular

(a) tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but

(b) unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.

(2) Where the case is within the next section respecting shipment tender requires that the seller comply with its provisions.

(3) Where the seller is required to deliver at a particular destination tender requires that he comply with subsection (1) and also in any appropriate case tender documents as described in subsections (4) and (5) of this section.

(4) Where goods are in the possession of a bailee and are to be delivered without being moved

- (a) tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgment by the bailee of the buyer's right to possession of the goods; but
 - (b) tender to the buyer of a non-negotiable document of title or of a written direction to the bailee to deliver is sufficient tender unless the buyer seasonably objects, and receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons; but risk of loss of the goods and of any failure by the bailee to honor the non-negotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.
- (5) Where the contract requires the seller to deliver documents
- (a) he must tender all such documents in correct form, except as provided in this Article with respect to bills of lading in a set (subsection (2) of Section 2—323); and
 - (b) tender through customary banking channels is sufficient and dishonor of a draft accompanying the documents constitutes non-acceptance or rejection.

§ 2—504. Shipment by Seller

Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must

- (a) put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and
- (b) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and
- (c) promptly notify the buyer of the shipment.

Failure to notify the buyer under paragraph (c) or to make a proper contract under paragraph (a) is a ground for rejection only if material delay or loss ensues.

§ 2—505. Seller's Shipment Under Reservation

(1) Where the seller has identified goods to the contract by or before shipment:

- (a) his procurement of a negotiable bill of lading to his own order or otherwise reserves in him a security interest in the goods.

His procurement of the bill to the order of a financing agency or of the buyer indicates in addition only the seller's expectation of transferring that interest to the person named.

- (b) a non-negotiable bill of lading to himself or his nominee reserves possession of the goods as security but except in a case of conditional delivery (subsection (2) of Section 2—507) a non-negotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession of the bill of lading.

(2) When shipment by the seller with reservation of a security interest is in violation of the contract for sale it constitutes an improper contract for transportation within the preceding section but impairs neither the rights given to the buyer by shipment and identification of the goods to the contract nor the seller's powers as a holder of a negotiable document.

§ 2—506. Rights of Financing Agency

(1) A financing agency by paying or purchasing for value a draft which relates to a shipment of goods acquires to the extent of the payment or purchase and in addition to its own rights under the draft and any document of title securing it any rights of the shipper in the goods including the right to stop delivery and the shipper's right to have the draft honored by the buyer.

(2) The right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular on its face.

§ 2—507. Effect of Seller's Tender; Delivery on Condition

(1) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.

(2) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due.

§ 2—508. Cure by Seller of Improper Tender or Delivery; Replacement

(1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without

money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

§ 2—509. Risk of Loss in the Absence of Breach

(1) Where the contract requires or authorizes the seller to ship the goods by carrier

- (a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 2—505); but
- (b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

(2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer

- (a) on his receipt of a negotiable document of title covering the goods; or
- (b) on acknowledgment by the bailee of the buyer's right to possession of the goods; or
- (c) after his receipt of a non-negotiable document of title or other written direction to deliver, as provided in subsection (4) (b) of Section 2—503.

(3) In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

(4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this Article on sale on approval (Section 2—327) and on effect of breach on risk of loss (Section 2—510).

§ 2—510. Effect of Breach on Risk of Loss

(1) Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance.

(2) Where the buyer rightfully revokes acceptance he may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as having rested on the seller from the beginning.

(3) Where the buyer as to conforming goods already identified to the contract for sale repudiates or is otherwise in breach before risk of their loss has passed to him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time.

§ 2—511. Tender of Payment by Buyer; Payment by Check

(1) Unless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete any delivery.

(2) Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it.

(3) Subject to the provisions of this Act on the effect of an instrument on an obligation (Section 3—802), payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment.

§ 2—512. Payment by Buyer Before Inspection

(1) Where the contract requires payment before inspection non-conformity of the goods does not excuse the buyer from so making payment unless

(a) the non-conformity appears without inspection; or

(b) despite tender of the required documents the circumstances would justify injunction against honor under the provisions of this Act (Section 5—114).

(2) Payment pursuant to subsection (1) does not constitute an acceptance of goods or impair the buyer's right to inspect or any of his remedies.

§ 2—513. Buyer's Right to Inspection of Goods

(1) Unless otherwise agreed and subject to subsection (3), where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.

(2) Expenses of inspection must be borne by the buyer but may be recovered from the seller if the goods do not conform and are rejected.

(3) Unless otherwise agreed and subject to the provisions of this Article on C.I.F. contracts (subsection (3) of Section 2—321), the buyer is not entitled to inspect the goods before payment of the price when the contract provides

(a) for delivery "C.O.D." or on other like terms; or

(b) for payment against documents of title, except where such payment is due only after the goods are to become available for inspection.

(4) A place or method of inspection fixed by the parties is presumed

to be exclusive but unless otherwise expressly agreed it does not postpone identification or shift the place for delivery or for passing the risk of loss. If compliance becomes impossible, inspection shall be as provided in this section unless the place or method fixed was clearly intended as an indispensable condition failure of which avoids the contract.

§ 2—514. When Documents Deliverable on Acceptance; When on Payment

Unless otherwise agreed documents against which a draft is drawn are to be delivered to the drawee on acceptance of the draft if it is payable more than three days after presentment; otherwise, only on payment.

§ 2—515. Preserving Evidence of Goods in Dispute

In furtherance of the adjustment of any claim or dispute

- (a) either party on reasonable notification to the other and for the purpose of ascertaining the facts and preserving evidence has the right to inspect, test and sample the goods including such of them as may be in the possession or control of the other; and
- (b) the parties may agree to a third party inspection or survey to determine the conformity or condition of the goods and may agree that the findings shall be binding upon them in any subsequent litigation or adjustment.

PART 6

BREACH, REPUDIATION AND EXCUSE

§ 2—601. Buyer's Rights on Improper Delivery

Subject to the provisions of this Article on breach in installment contracts (Section 2—612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2—718 and 2—719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

- (a) reject the whole; or
- (b) accept the whole; or
- (c) accept any commercial unit or units and reject the rest.

§ 2—602. Manner and Effect of Rightful Rejection

(1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

(2) Subject to the provisions of the two following sections on rejected goods (Sections 2—603 and 2—604),

- (a) after rejection any exercise of ownership by the buyer with

respect to any commercial unit is wrongful as against the seller;
and

- (b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this Article (subsection (3) of Section 2—711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but
- (c) the buyer has no further obligations with regard to goods rightfully rejected.

(3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this Article on Seller's remedies in general (Section 2—703).

§ 2—603. Merchant Buyer's Duties as to Rightfully Rejected Goods

(1) Subject to any security interest in the buyer (subsection (3) of Section 2—711), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(2) When the buyer sells goods under subsection (1), he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses include no selling commission then to such commission as is usual in the trade or if there is none to a reasonable sum not exceeding ten per cent on the gross proceeds.

(3) In complying with this section the buyer is held only to good faith and good faith conduct hereunder is neither acceptance nor conversion nor the basis of an action for damages.

§ 2—604. Buyer's Options as to Salvage of Rightfully Rejected Goods

Subject to the provisions of the immediately preceding section on perishables if the seller gives no instructions within a reasonable time after notification of rejection the buyer may store the rejected goods for the seller's account or reship them to him or resell them for the seller's account with reimbursement as provided in the preceding section. Such action is not acceptance or conversion.

§ 2—605. Waiver of Buyer's Objections by Failure to Particularize

- (1) The buyer's failure to state in connection with rejection a particular

defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach

- (a) where the seller could have cured it if stated seasonably; or
- (b) between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.

(2) Payment against documents made without reservation of rights precludes recovery of the payment for defects apparent on the face of the documents.

§ 2—606. What Constitutes Acceptance of Goods

(1) Acceptance of goods occurs when the buyer

- (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or
- (b) fails to make an effective rejection (subsection (1) of Section 2—602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
- (c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

§ 2—607. Effect of Acceptance; Notice of Breach; Burden of Establishing Breach After Acceptance; Notice of Claim or Litigation to Person Answerable Over

(1) The buyer must pay at the contract rate for any goods accepted.

(2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a non-conformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the non-conformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this Article for non-conformity.

(3) Where a tender has been accepted

- (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and
- (b) if the claim is one for infringement or the like (subsection (3) of Section 2—312) and the buyer is sued as a result of such a breach he must so notify the seller within a reasonable time

after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

(4) The burden is on the buyer to establish any breach with respect to the goods accepted.

(5) Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over

(a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after seasonable receipt of the notice does come in and defend he is so bound.

(b) if the claim is one for infringement or the like (subsection (3) of Section 2—312) the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or else be barred from any remedy over and if he also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after seasonable receipt of the demand does turn over control the buyer is so barred.

(6) The provisions of subsections (3), (4) and (5) apply to any obligation of a buyer to hold the seller harmless against infringement or the like (subsection (3) of Section 2—312).

§ 2—608. Revocation of Acceptance in Whole or in Part

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

§ 2—609. Right to Adequate Assurance of Performance

(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired.

When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

(2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

(3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

§ 2—610. Anticipatory Repudiation

When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may

- (a) for a commercially reasonable time await performance by the repudiating party; or
- (b) resort to any remedy for breach (Section 2—703 or Section 2—711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and
- (c) in either case suspend his own performance or proceed in accordance with the provisions of this Article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 2—704).

§ 2—611. Retraction of Anticipatory Repudiation

(1) Until the repudiating party's next performance is due he can retract his repudiation unless the aggrieved party has since the repudiation cancelled or materially changed his position or otherwise indicated that he considers the repudiation final.

(2) Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this Article (Section 2—609).

(3) Retraction reinstates the repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

§ 2—612. “Installment Contract”; Breach

(1) An “installment contract” is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause “each delivery is a separate contract” or its equivalent.

(2) The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.

(3) Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

§ 2—613. Casualty to Identified Goods

Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a “no arrival, no sale” term (Section 2—324) then

- (a) if the loss is total the contract is avoided; and
- (b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

§ 2—614. Substituted Performance

(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.

(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer’s obligation unless the regulation is discriminatory, oppressive or predatory.

§ 2—615. Excuse by Failure of Presupposed Conditions

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

- (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
- (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
- (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

§ 2—616. Procedure on Notice Claiming Excuse

(1) Where the buyer receives notification of a material or indefinite delay or an allocation justified under the preceding section he may by written notification to the seller as to any delivery concerned, and where the prospective deficiency substantially impairs the value of the whole contract under the provisions of this Article relating to breach of installment contracts (Section 2—612), then also as to the whole,

- (a) terminate and thereby discharge any unexecuted portion of the contract; or
- (b) modify the contract by agreeing to take his available quota in substitution.

(2) If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding thirty days the contract lapses with respect to any deliveries affected.

(3) The provisions of this section may not be negated by agreement except in so far as the seller has assumed a greater obligation under the preceding section.

PART 7
REMEDIES

§ 2—701. Remedies for Breach of Collateral Contracts Not Impaired

Remedies for breach of any obligation or promise collateral or ancillary to a contract for sale are not impaired by the provisions of this Article.

§ 2—702. Seller's Remedies on Discovery of Buyer's Insolvency

(1) Where the seller discovers the buyer to be insolvent he may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under this Article (Section 2—705).

(2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

(3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this Article (Section 2—403). Successful reclamation of goods excludes all other remedies with respect to them. As amended 1966.

§ 2—703. Seller's Remedies in General

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (Section 2—612), then also with respect to the whole undelivered balance, the aggrieved seller may

- (a) withhold delivery of such goods;
- (b) stop delivery by any bailee as hereafter provided (Section 2—705);
- (c) proceed under the next section respecting goods still unidentified to the contract;
- (d) resell and recover damages as hereafter provided (Section 2—706);
- (e) recover damages for non-acceptance (Section 2—708) or in a proper case the price (Section 2—709);
- (f) cancel.

§ 2—704. Seller's Right to Identify Goods to the Contract Notwithstanding Breach or to Salvage Unfinished Goods

- (1) An aggrieved seller under the preceding section may
 - (a) identify to the contract conforming goods not already identified if at the time he learned of the breach they are in his possession or control;
 - (b) treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished.

(2) Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.

§ 2—705. Seller's Stoppage of Delivery in Transit or Otherwise

(1) The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent (Section 2—702) and may stop delivery of carload, truckload, planeload or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.

- (2) As against such buyer the seller may stop delivery until
 - (a) receipt of the goods by the buyer; or
 - (b) acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or
 - (c) such acknowledgment to the buyer by a carrier by reshipment or as warehouseman; or
 - (d) negotiation to the buyer of any negotiable document of title covering the goods.
- (3)
 - (a) To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.
 - (b) After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.
 - (c) If a negotiable document of title has been issued for goods the bailee is not obliged to obey a notification to stop until surrender of the document.
 - (d) A carrier who has issued a non-negotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

§ 2—706. Seller's Resale Including Contract for Resale

(1) Under the conditions stated in Section 2—703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (Section 2—710), but less expenses saved in consequence of the buyer's breach.

(2) Except as otherwise provided in subsection (3) or unless otherwise agreed resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

(3) Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell.

(4) Where the resale is at public sale

- (a) only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and
- (b) it must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and
- (c) if the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and
- (d) the seller may buy.

(5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

(6) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (Section 2—707) or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (subsection (3) of Section 2—711).

§ 2—707. “Person in the Position of a Seller”

(1) A “person in the position of a seller” includes as against a principal an agent who has paid or become responsible for the price of goods on behalf of his principal or anyone who otherwise holds a security interest or other right in goods similar to that of a seller.

(2) A person in the position of a seller may as provided in this Article withhold or stop delivery (Section 2—705) and resell (Section 2—706) and recover incidental damages (Section 2—710).

§ 2—708. Seller’s Damages for Non-acceptance or Repudiation

(1) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2—723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2—710), but less expenses saved in consequence of the buyer’s breach.

(2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2—710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

§ 2—709. Action for the Price

(1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price

- (a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and
- (b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

(2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

(3) After the buyer has wrongfully rejected or revoked acceptance

of the goods or has failed to make a payment due or has repudiated (Section 2—610), a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for non-acceptance under the preceding section.

§ 2—710. Seller's Incidental Damages

Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

§ 2—711. Buyer's Remedies in General; Buyer's Security Interest in Rejected Goods

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2—612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

- (a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or
- (b) recover damages for non-delivery as provided in this Article (Section 2—713).

(2) Where the seller fails to deliver or repudiates the buyer may also

- (a) if the goods have been identified recover them as provided in this Article (Section 2—502); or
- (b) in a proper case obtain specific performance or replevy the goods as provided in this Article (Section 2—716).

(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (Section 2—706).

§ 2—712. "Cover"; Buyer's Procurement of Substitute Goods

(1) After a breach within the preceding section the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference

between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2—715), but less expenses saved in consequence of the seller's breach.

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

§ 2—713. Buyer's Damages for Non-Delivery or Repudiation

(1) Subject to the provisions of this Article with respect to proof of market price (Section 2—723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (Section 2—715), but less expenses saved in consequence of the seller's breach.

(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

§ 2—714. Buyer's Damages for Breach in Regard to Accepted Goods

(1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2—607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

§ 2—715. Buyer's Incidental and Consequential Damages

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

- (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

- (b) injury to person or property proximately resulting from any breach of warranty.

§ 2—716. Buyer's Right to Specific Performance or Replevin

(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.

(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

§ 2—717. Deduction of Damages From the Price

The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.

§ 2—718. Liquidation or Limitation of Damages; Deposits

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

(2) Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds

- (a) the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (1), or

- (b) in the absence of such terms, twenty per cent of the value of the total performance for which the buyer is obligated under the contract or \$500, whichever is smaller.

(3) The buyer's right to restitution under subsection (2) is subject to offset to the extent that the seller establishes

- (a) a right to recover damages under the provisions of this Article other than subsection (1), and

- (b) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

(4) Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of subsection (2); but if the seller has notice of the buyer's breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this Article on resale by an aggrieved seller (Section 2—706).

§ 2—719. Contractual Modification or Limitation of Remedy

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is *prima facie* unconscionable but limitation of damages where the loss is commercial is not.

§ 2—720. Effect of “Cancellation” or “Rescission” on Claims for Antecedent Breach

Unless the contrary intention clearly appears, expressions of “cancellation” or “rescission” of the contract or the like shall not be construed as a renunciation or discharge of any claim in damages for an antecedent breach.

§ 2—721. Remedies for Fraud

Remedies for material misrepresentation or fraud include all remedies available under this Article for non-fraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

§ 2—722. Who Can Sue Third Parties for Injury to Goods

Where a third party so deals with goods which have been identified to a contract for sale as to cause actionable injury to a party to that contract

- (a) a right of action against the third party is in either party to the contract for sale who has title to or a security interest or a special property or an insurable interest in the goods; and if the goods have been destroyed or converted a right of action is also in the party who either bore the risk of loss under the contract for sale or has since the injury assumed that risk as against the other;
- (b) if at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the contract for sale and there is no arrangement between them for disposition of the recovery, his suit or settlement is, subject to his own interest, as a fiduciary for the other party to the contract;
- (c) either party may with the consent of the other sue for the benefit of whom it may concern.

§ 2—723. Proof of Market Price: Time and Place

(1) If an action based on anticipatory repudiation comes to trial before the time for performance with respect to some or all of the goods, any damages based on market price (Section 2—708 or Section 2—713) shall be determined according to the price of such goods prevailing at the time when the aggrieved party learned of the repudiation.

(2) If evidence of a price prevailing at the times or places described in this Article is not readily available the price prevailing within any reasonable time before or after the time described or at any other place which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from such other place.

(3) Evidence of a relevant price prevailing at a time or place other than the one described in this Article offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise.

§ 2—724. Admissibility of Market Quotations

Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.

§ 2—725. Statute of Limitations in Contracts for Sale

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act becomes effective.

1. The first part of the report is a general statement of the work done during the year. It is a summary of the work done by the various departments of the institution, and is intended to give a general idea of the progress of the work.

2. The second part of the report is a statement of the work done by the various departments of the institution. It is a summary of the work done by the various departments, and is intended to give a general idea of the progress of the work.

3. The third part of the report is a statement of the work done by the various departments of the institution. It is a summary of the work done by the various departments, and is intended to give a general idea of the progress of the work.

4. The fourth part of the report is a statement of the work done by the various departments of the institution. It is a summary of the work done by the various departments, and is intended to give a general idea of the progress of the work.

5. The fifth part of the report is a statement of the work done by the various departments of the institution. It is a summary of the work done by the various departments, and is intended to give a general idea of the progress of the work.

6. The sixth part of the report is a statement of the work done by the various departments of the institution. It is a summary of the work done by the various departments, and is intended to give a general idea of the progress of the work.

7. The seventh part of the report is a statement of the work done by the various departments of the institution. It is a summary of the work done by the various departments, and is intended to give a general idea of the progress of the work.

8. The eighth part of the report is a statement of the work done by the various departments of the institution. It is a summary of the work done by the various departments, and is intended to give a general idea of the progress of the work.

APPENDIX 5

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

DRAFT CONVENTION ON THE INTERNATIONAL SALE OF GOODS (1977)*

PART I. SUBSTANTIVE PROVISIONS

CHAPTER I. SPHERE OF APPLICATION

Article 1

(1) This Convention applies to contracts of sale of goods entered into by parties whose places of business are in different States:

- (a) when the States are Contracting States; or
- (b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration.

Article 2

This Convention does not apply to sales:

- (a) of goods bought for personal, family or household use, unless

* Adopted at the Tenth Session of UNCITRAL, 186th Meeting, 17 June 1977, General Assembly, Official Records: Thirty-Second Session, Suppl. No. 17 (A/32/17), pp. 11 *et seq.*

At the Eleventh Session of UNCITRAL, held from 30 May to 16 June, 1978, UNCITRAL adopted a Draft Convention on Contracts for the International Sale of Goods, integrating the above Draft Convention with the Draft Convention on the Formation of Contracts for the International Sale of Goods. See General Assembly, Official Records: Thirty-Third Session, Suppl. No. 17 (A/33/17), pp. 10 *et seq.*

The 1978 Draft Convention did not become available to the Commission until the Fall of 1978. Accordingly, the Commission's deliberations were based upon the 1977 Draft Convention and it is this Draft Convention that is referred to in our accompanying Report. For this reason only the 1977 Draft Convention is reproduced here.

the seller, at the time of the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;

- (b) by auction;
- (c) on execution or otherwise by authority of law;
- (d) of stocks, shares, investment securities, negotiable instruments or money;
- (e) of ships, vessels or aircraft;
- (f) of electricity.

Article 3

(1) This Convention does not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.

(2) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

Article 4

The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions.

Article 5

For the purposes of this Convention:

- (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract;
- (b) if a party does not have a place of business, reference is to be made to his habitual residence.

Article 6

This Convention governs only the rights and obligations of the seller and the buyer arising from a contract of sale. In particular, except as otherwise expressly provided therein, this Convention is not concerned with:

- (a) the formation of the contract;
- (b) the validity of the contract or of any of its provisions or of any usage;

- (c) the effect which the contract may have on the property in the goods sold.

CHAPTER II. GENERAL PROVISIONS

Article 7

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Article 8

A breach committed by one of the parties is fundamental if it results in substantial detriment to the other party unless the party in breach did not foresee and had no reason to foresee such a result.

Article 9

A declaration of avoidance of the contract is effective only if made by notice to the other party.

Article 10

Unless otherwise expressly provided in this Convention, if any notice, request or other communication is given by a party in accordance with this Convention and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

Article 11

(1) A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means including witnesses.

(2) Paragraph (1) of this article does not apply to a contract of sale where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention.*

*

Article (X)

A Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing may, at the time of signature, ratification or accession, make a declaration to the effect that article 11, paragraph (1), shall not apply to any sale involving a party having his place of business in a State which has made such a declaration.

Article 12

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court could do so under its own law in respect of similar contracts of sale not governed by this Convention.

Article 13

In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity.

CHAPTER III. OBLIGATIONS OF THE SELLER

Article 14

The seller must deliver the goods, hand over any documents relating thereto and transfer the property in the goods, as required by the contract and this Convention.

Section I. Delivery of the goods and handing over of documents

Article 15

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

- (a) if the contract of sale involves carriage of the goods — in handing the goods over to the first carrier for transmission to the buyer;
- (b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place — in placing the goods at the buyer's disposal at that place;
- (c) in other cases — in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

Article 16

(1) If the seller is bound to hand the goods over to a carrier and if the goods are not clearly marked with an address or are not otherwise identified to the contract, the seller must send the buyer a notice of the consignment which specifies the goods.

(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for the carriage to the place fixed by means of transportation which are appropriate in the circumstances and according to the usual terms for such transportation.

(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must provide the buyer, at his request, with all available information necessary to enable him to effect such insurance.

Article 17

The seller must deliver the goods:

- (a) if a date is fixed by or determinable from the contract, on that date; or
- (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or
- (c) in any other case, within a reasonable time after the conclusion of the contract.

Article 18

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract.

Section II. Conformity of the goods and third party claims

Article 19

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. Except where otherwise agreed, the goods do not conform with the contract unless they:

- (a) are fit for the purposes for which goods of the same description would ordinarily be used;
- (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;
- (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
- (d) are contained or packaged in the manner usual for such goods.

(2) The seller is not liable under subparagraphs (a) to (d) of paragraph (1) of this article for any non-conformity of the goods if at the

time of the conclusion of the contract the buyer knew or could not have been unaware of such non-conformity.

Article 20

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in paragraph (1) of this article and which is due to a breach of any of his obligations, including a breach of any express guarantee that the goods will remain fit for their ordinary purpose or for some particular purpose, or that they will retain specified qualities or characteristics for a specific period.

Article 21

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. The buyer retains any right to claim damages as provided for in this Convention.

Article 22

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redispach, examination may be deferred until after the goods have arrived at the new destination.

Article 23

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless such time-limit is inconsistent with a contractual period of guarantee.

Article 24

The seller is not entitled to rely on the provisions of articles 22 and 23 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

Article 25

(1) The seller must deliver goods which are free from any right or claim of a third party, other than one based on industrial or intellectual property, unless the buyer agreed to take the goods subject to that right or claim.

(2) The buyer does not have the right to rely on the provisions of this article if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he became aware or ought to have become aware of the right of claim.

Article 26

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial or intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that that right or claim is based on industrial or intellectual property,

(a) under the law of the State where the goods will be resold or otherwise used if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

(b) in any other case under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under paragraph (1) of this article does not extend to cases where:

(a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

(b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

(3) The buyer does not have the right to rely on the provisions of this article if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he became aware or ought to have become aware of the right or claim.

Section III. Remedies for breach of contract by the seller

Article 27

(1) If the seller fails to perform any of his obligations under the contract and this Convention, the buyer may:

(a) exercise the rights provided in articles 28 to 34;

(b) claim damages as provided in articles 56 to 59.

(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

Article 28

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with such requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach and a request for substitute goods is made either in conjunction with notice given under article 23 or within a reasonable time thereafter.

Article 29

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in the performance.

Article 30

(1) Unless the buyer has declared the contract avoided in accordance with article 31, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. The buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under paragraph (2) of this article, that the buyer make known his decision.

(4) A request or notice by the seller under paragraphs (2) and (3) of this article is not effective unless received by the buyer.

Article 31

(1) The buyer may declare the contract avoided:

- (a) if the failure by the seller to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract; or
- (b) if the seller *has not delivered* the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 29 or has declared that he will not deliver within the period so fixed.

(2) However, in cases where the seller has made delivery, the buyer loses his right to declare the contract avoided unless he has done so within a reasonable time:

- (a) in respect of late delivery, after he has become aware that delivery has been made; or
- (b) in respect of any breach other than late delivery, after he knew or ought to have known of such breach, or after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 29, or after the seller has declared that he will not perform his obligations within such an additional period.

Article 32

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may declare the price to be reduced in the same proportion as the value that the goods actually delivered would have had at the time of the conclusion of the contract bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 30 or if he is not allowed by the buyer to remedy that failure in accordance with that article, the buyer's declaration of reduction of the price is of no effect.

Article 33

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, the provisions of articles 28 to 32 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

Article 34

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

CHAPTER IV. OBLIGATIONS OF THE BUYER

Article 35

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

Section I. Payment of the Price

Article 36

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any relevant laws and regulations to enable payment to be made.

*Article 37***

If a contract has been validly concluded but does not state the price or expressly or impliedly make provision for the determination of the price of the goods, the buyer must pay the price generally charged by the seller at the time of the conclusion of the contract. If no such price is ascertainable, the buyer must pay the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances.

Article 38

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

Article 39

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

(a) at the seller's place of business; or

(b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in the place of business of the seller subsequent to the conclusion of the contract.

** Ghana, the Philippines and the Union of Soviet Socialist Republics expressed formal reservations to this article.

Article 40

(1) The buyer must pay the price when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

Article 41

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or other formality on the part of the seller.

Section II. Taking delivery

Article 42

The buyer's obligation to take delivery consists:

- (a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and
- (b) in taking over the goods.

Section III. Remedies for breach of contract by the buyer

Article 43

(1) If the buyer fails to perform any of his obligations under the contract and this Convention, the seller may:

- (a) exercise the rights provided in articles 44 to 47;
- (b) claim damages as provided in articles 56 to 59.

(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

Article 44

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with such requirement.

Article 45

(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in the performance.

Article 46

(1) The seller may declare the contract avoided:

- (a) if the failure by the buyer to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract; or
- (b) if the buyer has not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 45, performed his obligation to pay the price or taken delivery of the goods, or if he has declared that he will not do so within the period so fixed.

(2) However, in cases where the buyer has paid the price, the seller loses his right to declare the contract avoided if he has not done so:

- (a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or
- (b) in respect of any breach other than late performance, within a reasonable time after he knew or ought to have known of such breach, or within a reasonable time after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 45 or the declaration by the buyer that he will not perform his obligations within such an additional period.

Article 47

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with any requirement of the buyer that may be known to him.

(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If the buyer fails to do so after receipt of such a communication, the specification made by the seller is binding.

**CHAPTER V. PROVISIONS COMMON TO THE OBLIGATIONS
OF THE SELLER AND OF THE BUYER**

Section I. Anticipatory breach and instalment contracts

Article 48

(1) A party may suspend the performance of his obligations if it is reasonable to do so because, after the conclusion of the contract, a serious deterioration in the ability to perform or in the credit worthiness of the other party or his conduct in preparing to perform or in actually performing the contract give good grounds to conclude that the other party will not perform a substantial part of his obligations.

(2) If the seller has already dispatched the goods before the grounds described in paragraph (1) of this article become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. This paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice to the other party thereof and must continue with performance if the other party provides adequate assurance of this performance.

Article 49

If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach, the other party may declare the contract avoided.

Article 50

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer, avoiding the contract in respect of any delivery, may, at the same time, declare the contract avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

Section II. Exemptions

Article 51

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if he is exempt under paragraph (1) of this article and if the person whom he has engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect only for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

Section III. Effects of avoidance

Article 52

(1) Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due. Avoidance does not affect any provisions of the contract for the settlement of disputes or any other provisions of the contract governing the respective rights and obligations of the parties consequent upon the avoidance of the contract.

(2) If one party has performed the contract either wholly or in part, he may claim from the other party restitution of whatever he has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

Article 53

(1) The buyer loses his right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) Paragraph (1) of this article does not apply:

(a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition

in which he received them is not due to an act or omission of the buyer; or

- (b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 22; or
- (c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered the lack of conformity or ought to have discovered it.

Article 54

The buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 53 retains all other remedies.

Article 55

(1) If the seller is bound to refund the price, he must also pay interest thereon from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:

- (a) if he must make restitution of the goods or part of them; or
- (b) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

Section IV. Damages

Article 56

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he then knew or ought to have known, as a possible consequence of the breach of contract.

Article 57

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction and any further damages recoverable under the provisions of article 56.

Article 58

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 57, recover the difference between the price fixed by the contract and the current price at the time he first had the right to declare the contract avoided and any further damages recoverable under the provisions of article 56.

(2) For the purposes of paragraph (1) of this article, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at another place which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

Article 59

The party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount which should have been mitigated.

Section V. Preservation of the goods

Article 60

If the buyer is in delay in taking delivery of the goods and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the buyer.

Article 61

(1) If the goods have been received by the buyer and he intends to reject them, he must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that he can do so without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination.

Article 62

The party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

Article 63

(1) The party who is bound to preserve the goods in accordance with articles 60 or 61 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the cost of preservation, provided that notice of the intention to sell has been given to the other party.

(2) If the goods are subject to loss or rapid deterioration or their preservation would involve unreasonable expense, the party who is bound to preserve the goods in accordance with articles 60 or 61 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

(3) The party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

CHAPTER VI. PASSING OF RISK

Article 64

Loss or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

Article 65

(1) If the contract of sale involves carriage of the goods and the seller is not required to hand them over at a particular destination, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer. If the seller is required to hand the goods over to a carrier at a particular place other than the destination, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of risk.

(2) Nevertheless, if the goods are not clearly marked with an address or otherwise identified to the contract, the risk does not pass to the buyer until the seller sends the buyer a notice of the consignment which specifies the goods.

Article 66

The risk in respect of goods sold in transit is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents controlling their disposition. However, if at the time of the conclusion of the contract the seller knew or ought to have known that the goods had been lost or damaged and he has not disclosed such fact to the buyer, such loss or damage is at the risk of the seller.

Article 67

(1) In cases not covered by articles 65 and 66 the risk passes to the buyer when the goods are taken over by him or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) If, however, the buyer is required to take over the goods at a place other than any place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to a sale of goods not then identified, the goods are deemed not to be placed at the disposal of the buyer until they have been clearly identified to the contract.

Article 68

If the seller has committed a fundamental breach of contract, the provisions of articles 65, 66 and 67 do not impair the remedies available to the buyer on account of such breach.

APPENDIX 6

RESOLUTION OF THE COUNCIL OF THE ONTARIO BRANCH OF THE CANADIAN BAR ASSOCIATION*

RESOLVED:

1. That the report of the Commercial Law Subsection for Ontario with respect to Article II [2] of the Uniform Commercial Code points up the fact that The Sale of Goods Act is inadequate for the purposes of present day business.
2. That the deficiencies of the existing legislation be brought to the attention of the Provincial Government with the suggestion that the Ontario Law Reform Commission be requested to study and report to the Provincial Government on the existing law.
3. The Commercial Law Subsection for Ontario recommends that consideration be given to the adoption of the principles and approaches of Article II [2] of the Uniform Commercial Code.

* Passed at a meeting of the members of Council of the Ontario Branch of the Canadian Bar Association held on Monday, September 29, 1969.

APPENDIX 7

REPORT OF THE SUB-COMMITTEE ON ARTICLE 2 OF THE UNIFORM COMMERCIAL CODE TO THE COMMERCIAL LAW SUBSECTION, ONTARIO BRANCH, CANADIAN BAR ASSOCIATION*

This report will deal with each of the parts of Article 2 with the exception of Part 1 which deals primarily with definitions. In preparing the report the Sub-Committee endeavoured not to deal exhaustively with Article 2 but only with those sections of Article 2 which, in the Sub-Committee's opinion, represent an improvement in the present Ontario law and which are worthy of consideration for adoption here. It must be borne in mind that any such adoption of Article 2 provisions would entail adopting the balance of Article 2 with or without modifications. Generally those sections of Article 2 not specifically dealt with represent a restatement of existing Ontario law which in most cases improves the language but does not change the substance thereof.

PART 2 — FORM, FORMATION AND READJUSTMENT OF CONTRACT

General Comments

Essentially, Part 2 of Article 2, of the Uniform Commercial Code attempts to free the law of sales from some of the rigid technicalities of the law of contracts, particularly the law with respect to *The Statute of Frauds*, cross offers preventing the formation of valid contracts arising from the conflicting terms contained in the "boiler plating" of standard purchase and acceptance forms, the validification of offers open for a stated time before acceptance, and the rendering of seals as inoperative in the law of sale of goods.

This part of the article recognizes that most contracts between commercial entities and between consumers and commercial entities are not made in the formal manner required by the more rigid rules of offer and acceptance, but rather more usually arise in an informal manner resulting from negotiations, offers, letters and even performance. It seeks to place the law of contracts within its proper commercial setting, rather than restricting the law of contracts to its present legalistic base.

* Reproduced with minor editorial amendments. No official date of publication is available but the report was approved by resolution of the Members of Council of the Ontario Branch of the Canadian Bar Association, September 29, 1969.

If a study were done of the manner in which contracts are generally entered into in a commercial setting, it might well be discovered that rarely do such contracts conform to the strict legal niceties of offer, acceptance, consideration, etc. Rather, you might find that there would usually be some technical legal rule rendering the contract invalid, particularly where the contract is formed by the use of standard purchase orders, followed by standard forms of acceptance. Part 2 of Article 2 recognizes this fact, and attempts to relate the law of contracts to commercial reality.

Section 2-201. Formal Requirements; Statute of Frauds

This section continues the requirement now found in section 5 of *The Sale of Goods Act*, that any contract for the sale of goods must be in writing in order for it to be enforceable. However, the requirement as to the type of writing has been liberalized so that it is sufficient if it indicates that a contract has been made even though it does not state all its essential terms.

The significant alterations are as follows:

- (a) The price of the goods is increased from \$40 to \$500.
- (b) The defence of unenforceability is disallowed if the seller has substantially begun to perform the contract by specially manufacturing the goods for the buyer in circumstances in which the goods are not suitable for sale to others.
- (c) An earnest, binding the contract, is dispensed with.
- (d) The rules with respect to acceptance of the goods can only apply in circumstances in which the buyer has also received the goods, thus preventing acceptance of the goods in terms of section 34 of *The Sale of Goods Act* by the buyer doing an act inconsistent with the seller's title in the goods, such as selling the goods on a sub-contract prior to the time in which he has received them, and thus being deemed to have received the goods (this would resolve some of the conflict between the cases of *Hardy and Company v. Hillerns and Fowler*, [1923] 2 K.B. 490 and the Canadian case of *A. J. Frank & Sons Ltd. v. Northern Peat Co. Ltd. et al.* (1963), 39 D.L.R. (2d) 721 (Ont. C.A.)).

This section also contains a provision which dispenses with the requirement of a written agreement where the contract is made "between merchants, and a confirmation of the contract is received by the party proposing the contract".

Section 2-202. Final Written Expression: Parol or Extrinsic Evidence

This section would alter the parol evidence rule by allowing introduction of additional terms not included within the written agreement

where such written terms are intended to expand upon the terms of the written agreement, or add to it, particularly where those terms are consistent with the contract. (Thus, the situation that arose in *Allen v. Danforth Motors Ltd.* (1957), 12 D.L.R. (2d) 572, where the orally agreed date of delivery of an automobile having not been included within the written contract prevented the buyer from cancelling the contract when the automobile was not delivered upon the orally agreed date.) It would appear that the section in the Uniform Commercial Code would allow the addition of the oral evidence to expand the contract, but not to modify it appreciably.

Section 2-204. Formation in General

This section would not appear to alter materially the present general law with respect to the formation of contracts, and the failure of contracts for uncertainty.

Of importance, however, is section 2-204(3) which allows open terms in the contract for the sale of goods if it can be determined that parties have intended to make a binding contract. Thus, the section may well alter the general rule that where an essential term of the contract is omitted, or where it appears by the terms of the contract that it is to be determined by a further agreement at a later date, the contract will fail for want of being definite (*May and Butcher, Ltd. v. The King*, [1934] 2 K.B. 17n; see also *Hillas & Co. Ltd. v. Arcos, Ltd.*, [1932] All E.R. Rep. 494). What this section does is to require the court to determine whether or not the parties intended to make a binding contract despite the fact that one of the terms of the contract may have been left open, or is to be agreed upon at a later date. Of course, this section leaves open the possibility of the court finding that the contract, because of the open term, was not intended to be binding.

Article 2 has a more particular section dealing with the more specific problem of "open price" terms (2-305) which recognizes their commercial importance.

Section 2-205. Firm Offers

This section alters the general rule that an offer to enter into a contract, which by its terms states that it will be open for a definite period, is not binding upon the offeror due to a failure of consideration. (*Dickinson v. Dodds* (1876), 2 Ch.D. 463.) It expressly provides that an offer open for acceptance for a stated period of time is not revocable for lack of consideration. No firm offer may be open for a period exceeding three months, and requires that any such term of assurance obtained in the offer be separately signed by the offeror. The section also requires that an offer be open for a reasonable time, and therefore might disallow an offeror from cancelling his offer immediately after he makes it. The section is only applicable "between merchants" (2-104) and thus excludes "consumer transactions" from its ambit.

Section 2-207. Additional Terms in Acceptance or Confirmation

This is perhaps one of the most important sections contained in Article 2 as it no longer requires an acceptance to be unequivocal and exactly corresponding to the offer, but allows an acceptance to contain additional terms. This alters the general rule that cross offers or a lack of exact correspondence between offer and acceptance does not result in a contract (*Tinn v. Hoffman & Company* (1873), 29 L.T. 271).

This section is important because the common practice of commercial entities in the purchase and sale of commodities is through the use of standard purchase orders and acceptance forms. Most often, the "boiler plate" included on the reverse of these offer and acceptance forms does not sufficiently match and may often result in no contract being formed between the parties as the terms of the acceptance do not expressly correspond with the terms of the offer.

Under this section additional or different terms from those offered may be included within the acceptance and yet a valid contract may be formed, unless those additional terms are expressly stated to make the acceptance conditional upon the offeror's assent to the additional terms.

Even where the additional terms are made conditional to the acceptance, conduct by the parties in entering into the performance of the contract would be sufficient to establish the contract, even though the writings of the parties do not establish a contract.

Section 2-209. Modification, Rescission and Waiver

This section releases the rules with respect to the modification of contracts from their present technical rules, and allows modification without fresh or new consideration. It allows a term in the contract, however, to deny modification unless such modification is in writing.

PART 3 — GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

Many and perhaps most of the sins of the present Sale of Goods Act of Ontario are sins of omission. Many important aspects of a modern sale are neither the subject of a statutory rule or of satisfactory case law. Some of the deficiencies of the present law covered by Part 3 of Article 2 are as follows:

1. Uncertainty and lack of mutuality is unsatisfactorily dealt with by rather stringent English case law which requires that a high degree of certainty and mutuality be present to effect creation of an enforceable contract. The provisions of Article 2 contain a more workable rule within the context of transactions in which terms are deliberately left vague by the parties. The principal problems have been in connection with open price agreements (section 2-305) and agreements relating to options and cooperation respecting performance (section 2-311).
2. Under present law, the strict rule is that parties are bound to the

contract regardless of the harshness of terms and the unequal bargaining position of the parties. There is much current discussion and concern about consumer protection but little about the inequality of bargaining which obtains even between businessmen, for example, in the case of the small merchant and the very large supplier. The provision of section 2-302 of the Code is designed to provide a general rule to enable a party to be relieved of harsh terms in appropriate circumstances. As with *The Unconscionable Transactions Relief Act* in Ontario, this does open the gate to some abuse, but may be a necessary restraint on clauses which might otherwise be imposed by the stronger party in a routine supply transaction. As noted elsewhere in this memorandum, the section can be left out, if it is thought inappropriate for a Code on general sales law, without affecting the other provisions.

3. Most litigation and the major problems centre on the seller's obligation with respect to quality of the goods. Sections of the Ontario Act dealing with the quality obligations and more particularly with the buyer's remedies are confused and therefore unsatisfactory. A special difficulty arises in connection with section 12, which has the effect of cutting off the buyer's rights in certain cases, and the relation between that section and the sections dealing with title, passage (sections 18 and 19) and with acceptance (sections 33 and 34). Conditions under which a buyer may exercise rights are as important as the rights themselves, and are indeed an integral part of the rights. These sections are scattered and, as noted, confused in the Ontario Act. The sections of the Uniform Commercial Code, namely 2-312 to 2-318, represent a desirable restatement and revision of the rules. Much of the substance of the existing law, which on the whole has been satisfactory, is retained in the revised section, but unnecessary prolixity is removed and the attempt is also made to remove obscurities.

An important aspect of the Code rules is contained in section 2-316 which deals with clauses limiting or excluding seller's obligations. The lack of an unconscionable-clause section has, in my opinion, led some courts to develop untenable and tortuous reasoning to relieve buyers from obligations which are clearly imposed upon them by harsh contracts. The combination of section 2-316 which provides rules of construction for dealing with exclusionary clauses and section 2-302 which provides relief from unconscionably harsh clauses are in my opinion a substantial improvement over the present state of Ontario law and of the English and other Canadian cases which might be followed in Ontario in appropriate situations should they arise.

4. An area where courts have sought to create agency relations to extend the benefits of the seller's obligations to persons who are not the direct purchasers from him is covered by section 2-318 which extends the seller's obligation to members of the family and household of a buyer. It does not otherwise abrogate the privity rule and would not provide a direct right of action by a consumer against a manufacturer. This latter is a field which has developed rather differently in the United States from Ontario

(that is the field of products liability) and might be the subject of a revision of the sales law, or a more general consumer protection statute. Certainly, the present situation in which a retail purchaser is required to pursue his contractual remedies against his seller and the latter in turn to pursue his against his supplier and so on, is hardly satisfactory if the obligation can be placed by this series of actions on the manufacturer. Still, this is a subject by itself and I note only that s. 2-318 of the U.C.C. eliminates problems of distinction between purchasers and members of the purchaser's household and/or other users.

5. The obligation to deliver and pay is reasonably well spelled out in the existing Ontario Act, but there is inconsistency between the general rules in section 26 and section 27 and the rules regarding the seller's obligation to deliver and the rules regarding the buyer's right of examination and rejection. These rules are rationalized in section 2-301 and section 2-503. Instalment deliveries covered in section 2-307 is a more direct statement of the rule familiar to us in section 30.

6. Standard trade terms such as F.O.B., F.A.S., C.I.F. etc., are nowhere the subject of statutory definition and are described and dealt with in very few Canadian cases. Most if not all of the English cases on which we might expect to rely for definition deal with international trade. Current Canadian commercial practice is to use these terms for domestic trade, as well as for international trade. In the latter case, the definitions set out in Incoterms 1953, a publication of the International Chamber of Commerce, provide a much more detailed and explicit specification of the party's obligations and are to be preferred for international trade in which the parties may be accustomed to different legal systems, although the contract itself may provide that it is governed by the law of one of the parties. However, in the domestic sales, the laws under which the parties are accustomed to trading are relatively the same (with the possible exception of Quebec) and it is desirable to have a working definition of the rules in the absence of satisfactory case law. This is provided by several sections of Article 2. It should be noted in this connection that the American definitions do differ to some extent from the English law on the terms, but, as I have noted elsewhere, the large number of transactions between American states and Canadian provinces makes desirable uniform rules on this subject. The fact that the Uniform Commercial Code has been adopted without substantial variation in all states except Louisiana makes it desirable that we should adopt the same rule. In such transactions, certainty of rules on F.O.B., C.I.F., etc. is more important than the details of the rules themselves and this would be provided by our adopting the uniform rules. Other trade terms such as "no arrival, no sale" are also covered and made more explicit by the statutory definition.

7. The passage of title under Ontario law is determinative of the specific remedies available to a buyer. The relevance of title is eliminated under the Code. This artificial concept has led to a great deal of confusion in the English and Ontario cases and should be eliminated in so far as it pertains to the rights and liabilities of the parties in the contract. Rele-

vance to the rights of third parties is another matter. There is a title passage rule in section 2-401, but its importance is much limited by the alteration of other rules which under existing Ontario law depend upon or are affected by the transfer of title. These special situations of sale or return or sale on approval are dealt with specifically in sections 2-326 and 2-327.

The following seriatim treatment of the sections of Part 3 of Article 2 taken in conjunction with the foregoing comment provides a general indication of the improvements effected by Part 3 of Article 2 as compared with the existing law. To save time and space, I have generally not repeated the substance of the provisions, and reference should be made to the relevant provisions of the Uniform Commercial Code.

Section 2-302. Unconscionable Contract or Clause

This is new and introduces a concept similar to *The Unconscionable Transactions Relief Act*. This section might be omitted without affecting the other improvements represented by Article 2 of the U.C.C.

Section 2-305. Open Price Term

Covers Ontario section 9 and more. Takes care of the problem represented by the leading House of Lords decision *May & Butcher, Ltd. v. The King*. Provides a workable rule where the price is left open in a contract. It rejects to a substantial extent the formula "an agreement to agree is unenforceable". Section 2-305(4) still leaves open the problem of determining when the parties intend not to be bound unless the price is fixed, but does alter the existing Ontario rule (including the English material) in a desirable way.

Section 2-306. Output, Requirements and Exclusive dealings

This is a new and useful provision relating to contracts for the output of the seller or the requirement of the buyer which was designed to cover common commercial situations.

Section 2-307. Delivery in Single Lot or Several Lots

This is a restatement of the rule contained in section 30 of the Ontario Act, with some alteration. It is a desirable simplification of the complicated language of section 30(2) and would probably obviate the difficulty represented by the instalment delivery cases.

*Section 2-312. Warranty of Title and Against Infringement;
Buyer's Obligation Against Infringement*

Subsections 1 and 2 are a restatement of the warranty of title and would replace the unsatisfactory jumble of section 13 of the Ontario Act. In addition, section 2-312 adds a warranty against infringement of patents or trademarks except in the case where the goods are supplied according to

the buyer's specifications in which case the buyer has the obligation to hold the seller harmless from such infringement. The obligation to warrant against infringement is confined to dealers in goods of the kind sold.

Section 2-313. Express Warranties by Affirmation, Promise, Description, Sample

A distinction is drawn between express warranties and implied warranties. This is a definite improvement over sections 14, 15 and 16 of the Ontario Act. The English law as represented in the Ontario Act assumed that the determination of express obligations is left to the general contract law and this has led to oversubtle distinctions between representations which do not become part of the contract and representations which do. The statement in section 2-313 is intended and will probably serve to clarify an impossible jumble of English case law. It does leave open the problem of the parol evidence rule which would have to be separately dealt with. It also encompasses the unnecessarily cumbersome statement of the rules in section 16 of the Ontario Act.

Section 2-314. Implied Warranty: Merchantability; Usage of Trade

This is the basic implied-warranty-of-merchantability and usage-of-trade section and covers the subject matter of section 15 of the Ontario Act. It eliminates the puzzling overlap of the first two subsections of section 15 and contains a workable definition of merchantability.

Section 2-315. Implied Warranty: Fitness for Particular Purpose

This section does preserve the fitness-for-a-particular-purpose rule of subsection 1 of section 15 of the Ontario Act, but makes it of general application to all sellers and not confined to merchants dealing in goods of the description sold. The trade-name proviso of section 15(1) is omitted and this eliminates a troublesome provision which has been omitted in several jurisdictions which have copied the English Act.

Section 2-316. Exclusion or Modification of Warranties

This contains a provision similar to section 53 of the Ontario Act, but with express reference to exclusion and modification of warranty. This has been the subject of extensive case law particularly in England which is unsatisfactory in that a doctrine of the "fundamental term" has been developed to avoid terms which the court considers unconscionable and which would probably be covered by section 2-302. Given the existence of the unconscionable-clause section, it would not be necessary for the court to employ patently artificial reasoning, such as that represented in the cases establishing the fundamental term doctrine, to relieve a buyer from an onerous exclusionary clause. Section 2-316 contains what appears to me to be a reasonable rule and also subclause (b) of subsection (3) covers the examination point contained in section 15(2) of the Ontario Act, an unsatisfactory provision which apparently limits the defect which

should have been revealed by the examination of the goods to the extent of the examination actually performed by the buyer. In other words, if the buyer performs an inadequate examination, it is only the defects which ought to have been revealed by such examination of which he cannot complain and not the defects which a reasonable examination would have revealed. The latter is the rule contained in the equivalent provision of the U.C.C.

Together sections 2-314, 2-315 and 2-316 would represent a great improvement over the Ontario provisions which are inadequate in that they are not as comprehensive as the U.C.C. provisions and are not definitive of the rights and obligations of the parties. Nor can it be said that the Ontario provisions or the equivalent English provisions have been the subject of satisfactory clarifying case law. The case law, while it has obviously added clarification in some aspects, has on the whole not succeeded in removing the difficulties inherent in the statutory provisions.

Section 2-318. Third Party Beneficiaries of Warranties Express or Implied

This section extends seller's warranties to members of the family or household of the buyer and guests. It abrogates the privity of contract rule and obviates the necessity of resorting to tortuous agency arguments to fix the seller with responsibility for defective goods used by a member of the household of the person who actually purchased the goods.

PART 4 — TITLE, CREDITORS AND GOOD FAITH PURCHASERS

Under *The Sale of Goods Act* one of the most prolific sources of litigation resulted from the necessity of locating the "property interest" or "title" to the goods as between buyer and seller. The Code aims to de-emphasize the importance of this conceptualistic approach by providing instead of legal consequences which were resolved by determination of the title question, legal consequences for varying factual situations. While section 2-401 provides general rules for locating title, these rules are no longer resorted to initially in dealing with any specific problem as, under Article 2 of the Code, it becomes necessary to look for a Code provision determinative of the issue at hand. The prime reason for this approach appears to be a result of attempting to take into account the fact that although title passage has always been considered to be dependent upon the intention of the parties, the parties do not think in terms of passing the property ownership or title and hence rarely sufficiently indicate their intention in this regard. This resulted in the common law and *The Sale of Goods Act* providing numerous "gap-filling rules" or presumptions regarding passage of title in specific situations. The difficulties arising from these gap-filling rules are the types of difficulties the Code has sought to avoid.

PART 5 — PERFORMANCE

Part 5 contains provisions for the situations where there is proper

performance by the parties and where there is a breach, repudiation or improper performance by one of the parties. For example, section 2-509 sets out rules for determining the risk of loss in the absence of breach. In the absence of any contrary agreement between the parties the risk is dependent upon the seller's performance by delivery of possession and not upon transfer of title.

PART 6 — BREACH, REPUDIATION AND EXCUSE

There are two noteworthy sections in Part 6 which are indicative of cures set forth by Article 2 in areas where *The Sale of Goods Act* is deficient.

Section 2-610. Anticipatory Repudiation

Section 2-611. Retraction of Anticipatory Repudiation

This topic is dealt with first by defining the alternatives available to the aggrieved party (these involve no substantive changes), setting forth the circumstances under which the repudiation may be retracted, the method by which the repudiation may be retracted (to include any insurance justifiably demanded), and the result which is the reinstatement of the repudiator's rights with allowance to the other party for delay caused by the repudiation.

Certain new and commercially useful concepts are employed: the arising of "reasonable grounds for insecurity" and the corresponding "adequate assurance of due performance", the reasonableness and adequacy being measured as between merchants, against "commercial standards". The failure to provide assurance which is adequate in the circumstances within a reasonable time is a repudiation of the contract.

Section 2-612. "Installment Contract"; Breach

(1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.

(2) The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.

(3) Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with

respect only to past installments or demands performance as to future installments.

PART 7 — REMEDIES

Part 7 of Article 2 of the Uniform Commercial Code deals with remedies which consist of three general groupings, namely: the seller's rights with respect to the goods, the seller's remedies and the buyer's remedies. Some of the problems which exist under our Sale of Goods Act which Part 7 deals with are:

- (a) The elimination for both buyer and seller of the harshness of the doctrine of election of remedies which has at times operated to deny full relief (sections 2-703, 2-711, 2-720).
- (b) For the seller, the extension of existing remedies arising upon the buyer's insolvency (section 2-702).
- (c) For both buyer and seller, the elimination of unfortunate technicalities which seem to result mainly from the title approach in regard to determination of amount of damages, and, for the seller, provisions broadening his right of resale and the consequences of its exercise, and the buyer's corresponding right of "cover" (sections 2-703, 2-706, 2-708, 2-712).
- (d) For the seller, a new right to identify to the contract unfinished goods without fear of being held to have failed to mitigate damages (section 2-704).
- (e) A modification of *The Statute of Limitations* (section 2-725).

Section 2-702. Seller's Remedies on Discovery of Buyer's Insolvency

Subject to the rights of good faith purchasers and lien creditors a seller on discovery of a buyer's insolvency may refuse to deliver. Further, on discovery that a buyer has received goods on credit while insolvent, the seller may reclaim the goods by demand made within ten days after receipt or at any time if written misrepresentation of solvency has been made to him by buyer within three months preceding delivery. Under *The Sale of Goods Act* the seller would merely be an unsecured creditor.

Section 2-703. Seller's Remedies in General

This section extends the seller's remedies to include the right to withhold delivery to all sellers, not only those who were unpaid as under *The Sale of Goods Act* if the buyer

- (i) rejects the goods
- (ii) revokes his acceptance
- (iii) fails to make payment due on or before delivery or
- (iv) repudiates the contract in part or in whole.

*Section 2-704. Seller's Right to Identify Goods to the Contract
Notwithstanding Breach or to Salvage Unfinished
Goods*

Seller may appropriate goods to the contract even though they are unfinished and may, in the exercise of reasonable commercial judgment to avoid loss, either complete the manufacture and identify the goods to the contract, or cease to manufacture and sell the goods for scrap.

*Section 2-711. Buyer's Remedies in General; Buyer's Security
Interest in Rejected Goods*

This section makes available to the Buyer two important new remedies: the right to "cover" or procure substitute goods on the open market (section 2-712), upon the Seller's breach and upon the Seller's insolvency to reach goods identified to the contract irrespective of the location of title (section 2-502).

In addition the Buyer may cancel the contract if the Seller fails to deliver or repudiates or when the Buyer rightfully rejects the goods or justifiably revokes his acceptance. This cancellation relieves the Buyer from the obligation to perform but does not preclude his other remedies.

Section 2-712. "Cover"; Buyer's Procurement of Substitute Goods

Under *The Sale of Goods Act*, the Buyer is not authorized or permitted to procure substitute goods regardless of the urgency of his need. If he did even at a price exceeding the contract price, this would be evidence of an available market and the contract price-market price differential plus special damages would be his recovery. The Buyer would have to prove his special damages and that they were in the contemplation of the parties when the contract was made in order to recover whereas such is not the case under this section of the Code as it entitles the Buyer to incidental or consequential damages.

Section 2-716. Buyer's Right to Specific Performance or Replevin

In addition to an action for specific performance this section entitles the Buyer to an action for replevin of goods identified to the contract if he is unable to effect cover.

*Section 2-720. Effect of "Cancellation" or "Rescission" on Claims
for Antecedent Breach*

This section makes it clear that in the absence of any expressed contrary intention the exercise of the above rights shall not be construed as a renunciation or discharge of any claim for damages for such a breach.

Section 2-725. Statute of Limitations in Contracts for Sale

This section provides a four-year limitation which may be reduced by agreement to not less than one year. A breach of warranty occurs when

tender of delivery is made except where the warranty extends to future performance of the goods and the cause of action accrues then regardless of knowledge.

CONCLUSION

The Sale of Goods Act was adopted in Ontario in 1920 and has remained without revision throughout the intervening 48 years. The Ontario Act followed closely the English Act of 1893. Commercial practices have changed substantially in the 75 years since the enactment of the U.K. Act, yet no revision of the Act has been undertaken in England or Ontario (or any other Canadian jurisdiction). The parallel situation in the United States is that the Uniform Sales Act was first promulgated by the Commissioners on Uniform State Laws in 1906 and was based largely on the U.K. Act. This Uniform Sales Act was adopted in most of the major commercial states. As we know, revision of the Uniform Sales Act has now taken place in the United States with the enactment of Article 2 of the Uniform Commercial Code.

The consensus of opinion of the Sub-Committee is that the present Sale of Goods Act of Ontario is not adequate to deal with today's commercial transactions and the problems arising in the course of such transactions. The Sub-Committee is of the opinion also that Article 2 should be enacted in the Province of Ontario firstly in order to remove the present inadequacy in the law and secondly in order to establish uniformity of sale of goods legislation with the United States in view of the magnitude of commercial transactions involving parties in Ontario and parties in states of the United States.

R. F. Booth, Chairman
R. F. Dykes
I. R. Feltham
M. H. Gropper
Hugh Guthrie

APPENDIX 8

Ontario Law Reform Commission THE SALE OF GOODS PROJECT

LIST OF RESEARCH PAPERS

I. EMPIRICAL AND STATISTICAL STUDIES

1. The Canadian Manufacturers' Association Questionnaire and Statistical Results
2. Fisher: Analysis of Computer Tabulation of Responses to Questionnaire Distributed to Ontario Members of The Canadian Manufacturers' Association
3. Munson: A Descriptive Overview of Marketing Functions as Perceived and Performed by the Entrepreneur
4. Perell: Analysis of Contractual Terms and Warranty Documents based on Materials received from O.L.R.C.—C.M.A. Questionnaire Respondents
5. Barnett & Perell: Selected Bibliography on Sale of Goods (other than warranties) and Selected Aspects of General Contract Law (together with supplement)

II. FORMATION OF CONTRACT

1. Waddams: The Effect of Unsigned Writings in the Formation of Sales Contracts: "The Battle of Forms" and Related Questions
2. Myers: The Law of Consideration
3. Trebilcock: Good Faith in Sales Transactions
4. Crawford: Formalities of Formation (Statute of Frauds)
5. Neilson: The Uncertainty of Terms in Sales Transactions
6. Carr: Privity of Contract
7. McCamus: The Doctrine of Frustration in the Law of Sales
8. McCamus: Mistake in Contracts for the Sale of Goods
9. Waddams: Research Memoranda:
 - A. Sealed Contracts in the Sale of Goods
 - B. Effect of Absent Time Provision in Sales Contracts (U.C.C. 2-309)
 - C. Output and Requirement Contracts and Exclusive Dealing (U.C.C. 2-306)

III. THE PARTIES' OBLIGATIONS, PERFORMANCE AND REMEDIES

1. Ziegel: Scope of The Sale of Goods Act
2. Waddams: The Classification of Contractual and Non-Contractual Obligations
3. Waddams: Implied Conditions and Warranties in The Sale of Goods Act, sections 13-16
4. Trebilcock: Fair Exchange of Values in Sales Transactions: The Doctrine of Unconscionability
5. Trebilcock: Disclaimer Clauses
6. Crawford: Performance Obligations: Delivery and Payment
7. Carr: Instalment Contracts
8. Carr: Anticipatory Repudiation and Mitigation of Damages
- 8a. Carr: Research Memorandum on Section 2-210 of Uniform Commercial Code — Assignment of Choses in Action and Delegation of Performance
9. Baer: Seller's Remedies
10. Ziegel: Buyer's Remedies
11. Neilson: Commercial Arbitration

IV. PROPERTY EFFECTS

1. Crawford: Property in Goods, Incidence and Consequences
2. Ziegel: The Nemo Dat Doctrine and Sales Transactions
3. Baer: Research Memorandum on Documents of Title

V. COMPARATIVE AND MISCELLANEOUS

1. May: Sale of Moveables in Quebec Law

Note: It is proposed to deposit some or all of the Research Papers in the Legislative Library of Ontario.

APPENDIX 9

COMPARATIVE ANALYSIS OF SHIPPING TERMS IN INCOTERMS 1953 AND SUPPLEMENT* AND IN ARTICLE 2 OF THE UNIFORM COMMERCIAL CODE**

*This Appendix is an edited version of a Paper
prepared by Francis A. Miniter*

Note: The Table is not exhaustive and is restricted to those shipping terms that are common to the two sources. Excluded therefore are those shipping terms that are defined in the INCOTERMS (that is, Ex Works, F.O.R.-F.O.T. Freight Paid to, Ex Quay, Delivered at the Frontier) but that do not appear in the Code. See further Chapter 14 of the Commission's Report.

* International Chamber of Commerce, Pub. 274, January 1974, reprinted February 1976, and April 1977.

** All references are to the 1972 Official Text of the *Uniform Commercial Code*.

I. Incoterms

II. Uniform Commercial Code

F.O.B. PLACE OF SHIPMENT

A. *The seller must*

1. Supply the goods in conformity with the contract of sale, together with such evidence of conformity as may be required by the contract. (p. 28)

2. Deliver the goods on board the vessel named by the buyer, at the named port of shipment, in the manner customary at the port, at the date or within the period stipulated, and notify the buyer, without delay, that the goods have been delivered on board. (p. 28)

A. *Seller's Obligations*

1. The Code contains no parallel provision under the shipping terms. But the seller is obliged generally by 2-301 to "transfer and deliver . . . in accordance with the contract." Further, 2-503(1) requires the seller to "put and hold conforming goods at the buyer's disposition".

The second limb of the Incoterm provision, that going to evidence of conformity, also has no direct parallel in the Code. However, the general principles relating to contract law and documentary credits should suffice to cover the point: e.g., Harfield, *Bank Credits and Acceptances*, 5th Ed., (1974) p. 57. In addition, 2-503(5)(a) requires the seller to tender any necessary documents in correct form.

- 2.a. Unless otherwise stated by the parties, the Code views F.O.B. a named place as a delivery term, which, when the term is F.O.B. place of shipment, obliges the seller to ship the goods at that place and bear the expense and risk of putting them into the possession of the carrier: 2-319(1)(a). Further, he must make a contract for their carriage reasonable in the circumstances: 2-504(a).

Where the term is also F.O.B. vessel, car or other vehicle, in addition to the above, the seller must at his own expense and risk load the goods on board: 2-319(1)(c).

I. Incoterms

II. Uniform Commercial Code

In *A.M. Knitwear v. All America Export-Import* (1976) 20 U.C.C. Rep. 581 (C.A.N.Y.) it was held that putting the goods in the possession of an impostor truckman was not fulfillment of the seller's obligation under 2-504.

- b. UCC 2-503(1) leaves the time, place and manner of tender to be determined by the agreement. 2-309(1) states that where the time for shipment or delivery is not provided for in the Article or by agreement it shall be a reasonable time.
- c. The seller must promptly notify the buyer of the shipment: 2-504(c).
- d. As to customs of the port, UCC 1-205 makes applicable to the interpretation of contracts whenever reasonable any relevant course of dealing or usage of trade. Unlike the Incoterms, 1-205(4) makes it clear that express contract terms override an inconsistent usage of trade or course of dealing. Further, a course of dealing between the parties is also deemed to override an inconsistent usage of trade. The case law under the Code indicates that evidence of a usage of trade is subject to the parol evidence rule: *New Hampshire Ins. Co. v. Cruise Shops, Inc.* (1971) 323 N.Y.S. 2d 352; *Nation Oil Co. v. R.C. Davoust Co.* (1964) 201 N.E. 2d. 260 (Ill. App.). There is also authority that to be binding on a party, that party must have knowledge of the custom or usage of trade: *St. Louis Southwestern Ry. Co. v. Garvey Elevators, Inc.* (1974) 505 F. 2d. 625 (C.A. 5).

I. Incoterms

3. At his own risk and expense obtain any export licence or other governmental authorisation necessary for the export of the goods. (p. 28)
4. Subject to the provisions of articles B.3 and B.4 below, bear all costs and risks of the goods until such time as they shall have effectively passed the ship's rail at the named port of shipment, including any taxes, fees or charges levied because of exportation, as well as the costs of any formalities which he shall have to fulfil in order to load the goods on board. (p. 28)

II. Uniform Commercial Code

3. There is no equivalent Code provision.

2-503 provides there is no tender unless the seller puts the goods at the buyer's disposition. In an appropriate case this could mean that the seller must acquire such documents.

4. By 2-509(1)(a) the risk of loss shifts from the seller to the buyer when the goods are duly delivered to the carrier in a shipment contract. In *National Heater Co. v. Corrigan Co. Mechanical Contractors, Inc.* 482 F. 2d 87 (C.A. 8, 1973) it was held that the F.O.B. term usually indicates the point at which delivery is made and risk passes, but will yield to a contrary indication in the contract. In *Chase Manhattan Bank v. Nissho Pacific Corp.* (1964) 254 N.Y.S. 2d 571 (App. Div.) it was held that the goods are at the buyer's risk from the moment of delivery to the carrier.

Where the goods are F.O.B. vessel as well as place of shipment the seller will be at risk under 2-319(1)(c) until the goods are loaded. (But this is not clear since 2-509(1)(a) is still applicable. The question is whether there is due delivery before the seller loads the goods. In *Minex v. International Trading Co.* (1969) 303 F. Supp. 205 (D.C. Va.) where the term was "F.O.B. stowed" risk passed when the cargo was stowed.) Otherwise, and this contrasts with the Incoterm, it would seem that the risk passes

I. Incoterms

5. Provide at his own expense the customary packaging of the goods, unless it is the custom of the trade to ship the goods unpacked. (p. 28)
6. Pay the costs of any checking operations (such as checking quality, measuring, weighing, counting) which shall be necessary for the purpose of delivering the goods. (p. 28)
7. Provide at his own expense the customary clean document in proof of delivery of the goods on board the named vessel. (p. 28)

II. Uniform Commercial Code

from the seller as soon as he complies with 2-319(1) and 2-504, even if the goods are not loaded.

The same appears to be true for the allocation of expenses.

5. UCC 2-314(2)(e) states as a criterion of merchantability that the goods be "adequately contained, packaged and labeled as the agreement may require." In the absence of a specific agreement on the issue, presumably 1-205, dealing with usage of trade and course of dealing would apply. Again, any agreement will override usage of trade.
6. The Code has no similar provision. Presumably, only if the buyer exercises his rights of inspection under 2-513 will he be obliged to bear the expenses of inspection. But if the goods are non-conforming and are rejected, the buyer may recover those expenses from the seller under 2-715. All other such costs would be borne by the seller.
7. There is no such provision in the Code as to "clean" documents. But Farnsworth, *Cases on Commercial Law* (3rd ed. 1976) pp. 460-461, indicates that letters of credit usually call for clean bills of lading, and that in any event such a requirement can be implied, citing *British Imex Industries Ltd. v. Midland Bank Ltd.*, [1958] 1 Q.B. 542.
2-504(b) provides that the seller shall obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain posses-

I. Incoterms

8. Provide the buyer, at the latter's request and expense (see B.6), with the certificate of origin. (p. 28)
9. Render the buyer, at the latter's request, risk and expense, every assistance in obtaining a bill of lading and any documents, other than that mentioned in the previous article, issued in the country of shipment and/or of origin and which the buyer may require for the importation of the goods into the country of destination (and, where necessary, for their passage in transit through another country). (pp. 28 and 30)

B. *The buyer must*

1. At his own expense, charter a vessel or reserve the necessary space on board a vessel and give the seller due notice of the name, loading berth of and delivery dates to the vessel. (p. 30)

II. Uniform Commercial Code

sion of the goods or otherwise required by the agreement or usage of trade.

The seller must also comply with 2-323, regarding bills of lading. This requires that in overseas shipment the seller must obtain a negotiable bill of lading stating that the goods have been loaded on board.

8. The Code has no similar provision.
9. As mentioned above, 2-504(b) requires the seller to obtain for the buyer all necessary documents. 2-323(1) requires the seller to obtain the bill of lading, unless otherwise agreed.

B. *Buyer's Obligations*

1. 2-311(2) provides that except as otherwise provided in subsections (1)(c) and (3) of section 2-319 specifications or arrangements relating to shipment are at the seller's option. See also 2-504, Official Comment 3. Under 2-319(1)(c) where the term is F.O.B. vessel, the buyer must name the vessel. Under 2-319(3) the buyer must give any needed instructions for making delivery, including the loading berth of the vessel, and in an appropriate case its name and sailing date. Expense for these tasks rests with buyer.

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2. Bear all costs and risks of the goods from the time when they shall have effectively passed the ship's rail at the named port of shipment, and pay the price as provided in the contract. (p. 30)
3. Bear any additional costs incurred because the vessel named by him shall have failed to arrive on the stipulated date or by the end of the period specified or shall be unable to take the goods or shall close for cargo earlier than the stipu-

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- 2-503(1)(b) provides that the buyer has the general obligation to furnish facilities reasonably suited to the receipt of the goods.
- 2.a. The passage of risk has been discussed *supra* in "F.O.B. place of shipment", A.4. But 2-510 further provides that in the event of a non-conformity that would permit rejection, the risk remains on the seller.
 - b. UCC 2-301 obliges the buyer to pay in accordance with the contract. 2-319(4) further provides that, under an F.O.B. term, unless otherwise agreed, the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution of the documents. Further to be noted are 2-514 and 4-503(a), providing that where the draft is a sight draft, the buyer is to pay, not accept, before receiving the documents: but where the draft is payable more than three days after presentment, the presenting bank may release the documents on the buyer's acceptance rather than payment. For further details, refer to Farnsworth, "Documentary Drafts under the Uniform Commercial Code", 22 Bus. Law. 479, 482-484 (1967).
 3. Where the term is simply F.O.B. place of shipment and the seller has fulfilled all his obligations by delivering the goods to the carrier, the buyer will probably be liable for any further expenses. On the other hand, the seller might not be

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lated date or the end of the period specified and all risks of the goods from the date of expiration of the period stipulated, provided, however, that the goods shall have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods. (p. 30)

4. Should he fail to name the vessel in time or, if he shall have reserved to himself a period within which to take delivery of the goods and/or the right to choose the port of shipment, should he fail to give detailed

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able to obtain the bill of lading required by 2-323. So he may not have so "duly delivered the goods to the carrier" as to effect a passage of risk under 2-509. When the term is also F.O.B. vessel, the seller still has obligations to fulfill to effect delivery (2-319(1)(c)) and presumably risk would not have passed. Sections 2-615 and 2-614 of the Code seem to apply here. Subject to 2-614, 2-615 might declare such failure of the ship to arrive, etc. not to be a breach on the part of the seller. The section is silent about the position of the buyer where he has the duty. But 2-614 provides that where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable . . . but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted. Presumably, in the meantime there would be no breach and no shift in risk. Costs are not allocated, and remain on the seller.

If no substitute performance is available, the contract might be viewed as frustrated. This shifts all the burdens back to the seller under s. 2-615.

On the question of appropriation to the contract, see "Ex-Ship", A.3, *infra*.

4. Section 2-510 places the risk of loss on the buyer to the extent of any deficiency in the seller's effective insurance coverage for a commercially reasonable time where he is in breach before the risk would otherwise pass.

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instructions in time, bear any additional costs incurred because of such failure, and all the risks of the goods from the date of expiration of the period stipulated for delivery, provided, however, that the goods shall have been duly appropriated to the contract, that is to say clearly set aside or otherwise identified as the contract goods. (p. 30)

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The principle was applied in *Multiplastics Inc. v. Arch Industries*, 14 U.C.C. Rep. 573 (Conn. S.Ct. 1974) where the buyer failed to respond to the seller's request for shipping instructions, and the goods were destroyed a month later by a warehouse fire. In addition 2-311(3) states that where one party fails to give the required specifications which materially affect the other's performance the other party is excused from any resulting delay in his own performance and may either proceed to perform in a reasonable manner or treat the failure to specify as a breach. Official Comment 3 to 2-504 stresses that 2-311 gives the seller wide latitude in making reasonable shipping arrangements, and that the seller's obligations are relaxed where the buyer fails to make the appropriate arrangements on notification by the seller of the need to do so. This is further reinforced by the provisions of 2-319(3) allowing the seller to treat the failure to give instructions as a failure of cooperation under 2-311.

As to the seller's recovery of costs, 2-708(1) and (2) allow the seller to claim for incidental, but not consequential damages. 2-708(2) also makes a further reference to an allowance for costs incurred.

It is not clear just what this adds. On the question of appropriation to the contract, see "Ex-Ship", A.3, *infra*.

5. Pay any costs and charges for obtaining a bill of lading if

5. There is no provision in the Code on this. But the Code

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incurred under article A.9 above. (pp. 30 and 32)

6. Pay all costs and charges incurred in obtaining the documents mentioned in articles A.8 and A.9 above, including the costs of certificates of origin and consular documents. (p. 32)

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does make it the seller's duty to furnish a bill of lading, as noted above; hence, the expense of carrying out that duty may lie with the seller.

6. The Code has no similar provision. But 2-504(b) requires the seller to furnish the buyer with all the documents he will require to obtain the goods. It would seem to follow that the costs follow the duty.

DELIVERED (INCOTERMS) OR F.O.B. PLACE OF DELIVERY (UCC)

A. The seller must

1. Supply the goods in conformity with the contract of sale, together with such evidence of conformity as may be stipulated in the contract of sale. (p. 82)
2. At his own risk and expense:
 - a. put the contract goods at the disposal of the buyer, duty paid, at the named place of destination in the country of importation on the date or within the period stipulated in the contract of sale, and at the same time supply the buyer with a customary document of transport, warehouse warrant, dock warrant, delivery order, or the like, as the case may be, providing by endorsement or otherwise for the delivery of the goods to the buyer or to his order at the named place of destination in the country of importation and also with such other documents, if any, as may be strictly required at that time and place for the purpose of enabling the buyer to take delivery of the goods, as provided in Article B.1.

A. Seller's Obligations

1. Refer to "F.O.B. place of shipment", A.1, *supra*.
2.
 - a. 2-319(1)(b) provides that when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them according to 2-503.

2-503 requires the seller to make a reasonable tender to the buyer, and further requires that in an appropriate case the seller tender a negotiable bill of lading (overseas shipments: 2-323); such tender of documents must be in correct form and tender through customary banking channels is sufficient.

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The goods so put at the disposal of the buyer must be clearly set aside or otherwise identified as the contract goods. (p. 82)

- b. Provide the import licence or permit and bear the cost of any import duties or taxes, including the cost of Customs clearance, as well as any other taxes, fees or charges payable at the named place of destination at the time of the importation of the goods, so far as they are necessary to enable the seller to put the goods duty paid at the disposal of the buyer at that place. (p. 82)
- c. Comply with all formalities he may have to fulfil for these purposes. (p. 82)
3. Bear all the risks of the goods up to the time when he has fulfilled his obligations under Article A.2a. (p. 84)
4. Procure at his own risk and expense, in addition to the documents contemplated in Article A.2a, any export license or permit, exchange control authorization, certificates, consular invoice and other documents issued by the public authorities concerned, which he may require for the purposes of dispatching the goods, exporting them from the country of dispatch, passing them in transit through one or more third countries (if necessary), importing them into the country of the named place of destination, and putting them at the

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- b. This seems to be covered in 2-319(1)(b). The seller bears these costs.
- c. No similar provision.
3. 2-509(1)(b) provides that the risk of loss generally passes to the buyer in cases where the goods are to be shipped when the goods are so duly tendered as to enable the buyer to take delivery; 2-319(b) would seem to set out the same rule.

4. See comments to "F.O.B. Place of Shipment", A.3, *supra*.

Under 2-503 there is no tender unless the goods are put and held at the disposal of the buyer. If documentation is required before this can be done, there is as yet no tender.

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disposal of the buyer at the place. (p. 84)

5. Contract on usual terms, at his own risk and expense, for the transport of the goods from the point of departure in the country of dispatch to the named place of destination, bear and pay the freight or other costs of transport to that place, and also, subject to the provisions of Article A.6, any other expenses of or incidental to any movement whatsoever of the goods up to the time when they are duly put at the disposal of the buyer at the named place of destination.

Nevertheless, the seller shall, at his own risk and expense, be at liberty to use his own means of transport, provided that in the exercise of such liberty he shall perform all his other duties under these rules.

If no particular point (station, pier, quay, wharf, warehouse or as the case may be) at the named place of destination in the country of importation is stipulated in the contract of sale or prescribed by the regulations of the Customs or other competent authority concerned, or by the regulations of the public carrier, the seller may, if there are several points to choose from, select the point which suits him best, provided it offers such Customs and other proper facilities as may be necessary to enable the parties to perform their respective duties under these Rules. The point so chosen by the seller must be notified to the buyer . . . and thereupon that point shall be deemed for the

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5. 2-504 does not apply to destination contracts, so there is no explicit requirement to make a reasonable contract. But under 2-319(1)(b), since the seller has the expense and risk of transporting the goods to the place of delivery, there is little risk that he will make a contract that will not reasonably protect the risk he bears.

There is no limitation on how the seller is to get the goods to the buyer. The option is with the seller: 2-311(2).

Arrangements concerning shipments are at the seller's option unless otherwise agreed: 2-311(2). But 2-503(1)(b) provides that unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods. It follows that the expense of furnishing facilities is that of the buyer. The scope of "facilities" to be furnished by the buyer is unclear.

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- purposes of these Rules to be the point at the named place of destination at which the goods shall be put at the disposal of the buyer and the risks of the goods shall pass. (pp. 84 and 86)
6. If it is necessary or customary for the goods to be unloaded, discharged or landed on their arrival at the named place of destination for the purpose of putting them duty paid at the disposal of the buyer at that place, bear and pay the expenses of such operations, including any lightering, wharfing, warehousing and handling charges. (p. 86)
 7. Notify the buyer, at the seller's expense, that the goods have been placed in the custody of the first carrier for dispatch to the named place of destination, or that they have been dispatched to that destination by the seller's own means of transport, as the case may be. Any such notice must be given in sufficient time to allow the buyer to take such measures as are normally necessary for the purpose of enabling him to take delivery of the goods. . . . (p. 86)
 8. Provide at his own expense, packaging customary for transport of goods of the contract description to the named place of destination, unless it is the usage of the particular trade to dispatch goods of the contract description unpacked. (p. 86)
 9. Bear and pay the expenses of or incidental to any checking operations, such as measuring, weighing, counting or analysing

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6. The Code is silent on this point. UCC 1-205 picks up usages of trade, but only if the party who will be bound is actually or constructively informed of the usage.
7. 2-503(1) requires the seller to give the buyer any notification reasonably necessary to enable him to take delivery.
8. Refer to "F.O.B. Place of Shipment", A.5, *supra*.
9. The general requirement of 2-319(1)(b) that the seller bear the risk and expense of transporting the goods to the place

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of quality, which may be necessary to enable him to transport the goods to the named place of destination and to put them at the disposal of the buyer at that place. (p. 86)

10. Bear and pay, in addition to any expenses to be borne and paid by the seller in accordance with Articles A.1 to 9 inclusive, any other expenses of or incidental to the performance of the seller's duty to put the goods at the disposal of the buyer at the named place of destination in accordance with these Rules. (p. 88)

B. The buyer must

1. Take delivery of the goods as soon as the seller has duly put them at his disposal at the named place of destination, and be responsible for handling all subsequent movement of the goods. (p. 88)
2. Bear and pay the expenses of or incidental to unloading, discharging or landing the goods on their arrival at the named place of destination, in so far as such expenses are not payable by the seller in accordance with the provisions of Article A.6.
3. Bear all the risks of the goods and pay any expenses whatsoever incurred in respect thereof from the time when they have been put at his disposal at the named place of destination in accordance with Article A.2a. (p. 88)
4. If he fails to take delivery of the goods as soon as they have been duly put at his disposal,

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of destination would seem to cover this requirement.

10. See "F.O.B. Place of Delivery", A.9 *supra*. The Code provision is more comprehensive and expressed more simply. The general requirement of 2-503(1) that the goods be placed at the buyer's disposition according to the terms of the agreement is also relevant here.

B. Buyer's Obligations

1. 2-301 contains the general obligation of the buyer to accept and pay in accordance with the contract. 2-319(4) requires the buyer to make payment against the required documents if there is an F.O.B. contract.
2. The Code has no similar provision. But see comments to "F.O.B. Place of Delivery", B.3 *infra*.
3. 2-509(1)(b) provides that the risk passes when the goods are so duly tendered as to enable the buyer to take delivery. Presumably, the responsibility for costs shifts at the same time.
4. 2-510(3) shifts the risk to the extent of any deficiency in the seller's effective insurance cov-

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bear all the risks of the goods and pay any additional expenses incurred whether by the seller or by the buyer, because of such failure, provided that the goods shall have been clearly set aside or otherwise identified as the contract goods. (p. 88)

5. Supply the seller, at his request, with the address of the final destination of the goods in the country of importation, if the seller requires such information for the purpose of applying for such documents as are contemplated in Article A.2b. (p. 88)
6. Bear and pay the expenses incurred by the seller in providing the buyer with any expert third-party certificate of conformity of the goods stipulated in the contract of sale. (p. 88)
7. Render to the seller, at the seller's request, risk and expense, a reasonable amount of assistance in obtaining any documents which may be issued in the country of importation and which the seller may require for the purpose of putting the goods at the disposal of the buyer in accordance with these Rules. (p. 90)

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erage to the buyer in the event of his breach for a commercially reasonable period, and 2-708 allows the seller to recover incidental damages.

5. UCC 2-311(3) respecting cooperation would probably apply here to oblige the buyer to supply the information.
6. Except for 2-513 providing for the buyer's right of inspection at his own expense, the Code is silent.
7. The Code is silent on this point. Again, 2-311(3) would probably apply.

F.A.S.

A. The seller must

1. Supply the goods in conformity with the contract of sale, together with such evidence of conformity as may be required by the contract. (p. 22)
2. Deliver the goods alongside the vessel at the loading berth

A. Seller's Obligations

1. See "F.O.B. Place of Shipment", A.1, *supra*.
2. 2-319(2) provides that, unless otherwise agreed, the term

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named by the buyer, at the named port of shipment, in the manner customary at the port, at the date or within the period stipulated, and notify the buyer, without delay, that the goods have been delivered alongside the vessel. (p. 22)

3. Render the buyer at the latter's request, risk and expense, every assistance in obtaining any export licence, or other governmental authorization necessary for the export of the goods. (p. 22)
4. Subject to the provisions of Articles B.3 and B.4 below, bear all costs and risks of the goods until such time as they shall have been effectively delivered alongside the vessel at the named port of shipment, including the costs of any formalities which he shall have to fulfil in order to deliver the goods alongside the vessel. (p. 22)
5. Provide at his own expense the customary packing of the goods, unless it is the custom of the trade to ship the goods unpacked. (p. 22)
6. Pay the costs of any checking operations (such as checking quality, measuring, weighing, counting) which shall be necessary for the purpose of delivering the goods alongside the vessel. (p. 22)
7. Provide at his own expense the customary clean document in

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F.A.S. vessel, even though used only in connection with a stated price, is a delivery term. Clause (a) of the subsection requires the seller at his own expense and risk to deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer.

UCC 2-503(1) contains the notification requirement.

3. The Code is silent on this point.
4. 2-319(2)(a) places the risk on the seller until the goods are properly delivered alongside the vessel. Then 2-509(1)(a), which specifies that title to goods to be shipped other than under a destination contract passes when the goods are delivered to the carrier, acts to pass the risk on to the buyer.
5. See "F.O.B. Place of Shipment", A.5, *supra*.
6. 2-319(2)(a) places all expenses in delivering the goods alongside upon the seller.
7. 2-319(2)(b) requires the seller to obtain and tender a receipt

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proof of delivery of the goods alongside the named vessel. (p. 22)

8. Provide the buyer, at the latter's request and expense (see B.9), with the certificate of origin. (p. 24)
9. Render the buyer, at the latter's request, risk and expense, every assistance in obtaining any documents other than that mentioned in Article A.8, issued in the country of shipment and/or of origin (excluding a bill of lading and/or consular documents) and which the buyer may require for the importation of the goods into the country of destination (and, where necessary, for their passage in transit through another country). (p. 24)

B. *The buyer must*

1. Give the seller due notice of the name, loading berth of and delivery dates to the vessel. (p. 24)
2. Bear all the charges and risks of the goods from the time when they shall have been effectively delivered alongside the vessel at the named port of shipment, at the date or within the period stipulated, and pay the price as provided in the contract. (p. 24)
3. Bear any additional costs incurred because the vessel named by him shall have failed

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for the goods in exchange for which the carrier is under a duty to issue a bill of lading.

8. There is no such provision in the Code.
9. 2-503 does not seem to impose this duty on the seller; and 2-504 does not seem to apply to F.A.S. contracts. Thus the Code says nothing on this point.

B. *Buyer's Obligations*

1. 2-319(3) requires the buyer to seasonably give any instructions for making delivery, including the loading berth of the vessel and in an appropriate case its name and sailing date. Failure of the buyer to do so allows the seller to treat this as a failure of cooperation under 2-311.
- 2.a. The risk passes to the buyer when the goods have been delivered to the carrier alongside the vessel: 2-509(1)(a), and 2-319(2).
- b. 2-319(4) provides that under an F.A.S. term the buyer must make payment against tender of the required documents.
3. Once delivery alongside the vessel has occurred, the risks and costs fall on the buyer. Should

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to arrive on time, or shall be unable to take the goods, or shall close for cargo earlier than the stipulated date, and all the risks of the goods from the time when the seller shall place them at the buyer's disposal provided, however, that the goods shall have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods. (p. 24)

4. Should he fail to name the vessel in time or, if he shall have reserved to himself a period within which to take delivery of the goods and/or the right to choose the port of shipment, should he fail to give detailed instructions in time, bear any additional costs incurred because of such failure and all the risks of the goods from the date of expiration of the period stipulated for delivery, provided, however, that the goods shall have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods. (pp. 24 and 26)
5. Pay all costs and charges incurred in obtaining the documents mentioned in Articles A.3, A.8 and A.9 above. (p. 26)

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events altogether prevent the seller from placing the goods alongside the vessel, the provisions of 2-614 as to substituted performance apply. If there is no possible substituted performance, the law as to frustration may become relevant. (See also "F.O.B. Place of Shipment", B.3, *supra*.)

4. See comments to "F.O.B. Place of Shipment", B.4, *supra*. On the question of appropriation to the contract, see "Ex-Ship", A.3, *infra*.
5. Since the Code only provides that the seller has an obligation to obtain the customary receipt for the goods, it would seem to follow that the onus and cost of obtaining other documents is on the buyer.

C. & F.

A. The seller must

1. Supply the goods in conformity with the contract of sale, together with such evidence of

A. Seller's Obligations

1. See comments to "F.O.B. Place of Shipment", A.1., *supra*.

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conformity as may be required by the contract. (p. 34)

2. Contract on usual terms at his own expense for the carriage of the goods to the agreed port of destination by the usual route, in a seagoing vessel (not being a sailing vessel) of the type normally used for the transportation of goods of the contract description, and pay freight charges and any charges for unloading at the port of discharge which may be levied by regular shipping lines at the time and port of shipment. (p. 34)

3. At his own risk and expense obtain any export license or other governmental authorization necessary for the export of the goods. (p. 34)
4. Load the goods at his own expense on board the vessel at the port of shipment and at the date or within the period fixed or, if neither date nor time

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2. 2-320(1) states that the term C. & F. means that the price includes the cost and freight to the named destination. 2-320(3) importing all of 2-320(2), except the obligation to insure, requires *inter alia* that the seller put the goods into the possession of a carrier at the port of shipment and obtain a negotiable bill or bills of lading covering the entire transportation to the named destination.

Unlike 2-504(a), which does not apply here because the goods are to be shipped to a particular destination (see 2-320(1)), 2-320 does not expressly require the contract of carriage to be reasonable in all the circumstances. On the other hand, Official Comment 4 says that the requirement must be read in light of its purpose, to assure the buyer of as full protection as the conditions of shipment reasonably permit.

The Code contains no provision regarding the costs of unloading. UCC 1-205 respecting course of dealing and usage of trade would apply.

3. 2-320(2)(d), which under 2-320(3) applies to C. & F. contracts, requires the seller to procure any documents required to effect shipment or to comply with the contract.
4. 2-320(2)(b), which under 2-320(3) applies to C. & F. contracts, requires the seller to load the goods; and 2-320(2)(e) requires the seller to for-

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have been stipulated, within a reasonable time, and notify the buyer, without delay, that the goods have been loaded on board the vessel. (p. 34)

5. Subject to the provisions of Article B.4 below, bear all the risks of the goods until such time as they shall have effectively passed the ship's rail at the port of shipment. (p. 34)

6. At his own expense furnish to the buyer without delay a clean negotiable bill of lading for the agreed port of destination, as well as the invoice of the goods shipped. The bill of lading must cover the contract goods, be dated within the period agreed for shipment, and provide by endorsement or otherwise for delivery to the order of the buyer or buyer's agreed representative. Such bill of lading must be a full set of "on board" or "shipped" bills of lading, or a "received for shipment" bill of lading duly endorsed by the shipping company to the effect that the goods are on board, such endorsement to be dated within the period agreed for shipment. If

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ward and tender with commercial promptness all the documents in due form with any endorsements necessary to perfect the buyer's rights. Otherwise, the only notification requirement is that found in UCC 2-503(1).

5. 2-509(1)(a) passes the risk of loss to the buyer when the goods are duly delivered to the carrier. One would suppose that the goods had not been duly delivered until the requirement under 2-320(2)(b) that the goods be loaded, was satisfied. But in *Continental Ore Corp. v. U.S.* (1970) 423 F. 2d 1248 (Ct. of Claims) it was held that in a C. & F. contract the seller is responsible for getting the goods alongside the ship and risk passes at that point. Although not bound by the Code, the Court used it as persuasive authority.

6. Clause (a) of UCC 2-320(2) requires the seller to obtain a negotiable bill of lading covering the entire transportation to the named destination; clause (b) requires him to obtain a receipt, which may be part of the bill of lading from the carrier, showing that the freight has been paid or provided for, and clause (d) requires him to prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract. As noted in "F.O.B. Place of Shipment", A.7, *supra*, letters of credit usually require a clean bill of lading and, if the letter of credit does not, the common law will imply the requirement.

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the bill of lading contains a reference to the charter-party, the seller must also provide a copy of this latter document.

Note: A clean bill of lading is one which bears no superimposed clauses expressly declaring a defective condition of the goods or packaging.

The following clauses do not convert a clean bill into an unclean bill: a) clauses which do not expressly state that the goods or packaging are unsatisfactory, e.g. "second-hand cases", "used drums", etc.; b) clauses which emphasize carrier's non-liability of the goods or the packaging; c) clauses which disclaim on the part of the carrier knowledge of contents, weight, measurement, quality, or technical specification of the goods. (pp. 34 and 36)

7. Provide at his own expense the customary packaging of the goods, unless it is the custom of the trade to ship the goods unpacked. (p. 36)
8. Pay the costs of any checking operations (such as checking quality, measuring, weighing, counting) which shall be necessary for the purpose of loading the goods. (p. 36)
9. Pay any dues and taxes incurred in respect of the goods, up to the time of their loading, including any taxes, fees or charges levied because of exportation, as well as the costs of any formalities which he shall have to fulfil in order to load the goods on board. (p. 36)

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2-323(2) provides that in the case of an overseas shipment tender of one part of a bill of lading issued in a set will suffice unless the buyer demands the full set. But tender of a single part is nonetheless acceptable within the cure provisions of the Code (2-508(1)).

[Honnold indicates that this reference should be to 2-508 (2)].

7. See "F.O.B. Place of Shipment", A.5, *supra*.
8. Specifically, the Code is silent. Generally, the costs at this stage are borne by the seller: 2-320(2) and (3).
9. See comment to "C. & F.", A.8, *supra*.

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10. Provide the buyer, at the latter's request and expense (see B.5) with the certificate of origin and consular invoice. (p. 36)
11. Render the buyer, at the latter's request, risk and expense, every assistance in obtaining any documents, other than those mentioned in the previous article, issued in the country of shipment and/or origin and which the buyer may require for the importation of the goods into the country of destination (and, where necessary, for their passage in transit through another country). (p. 38)

B. The buyer must

1. Accept the documents when tendered by the seller, if they are in conformity with the contract of sale, and pay the price as provided in the contract. (p. 38)
2. Receive the goods at the agreed port of destination and bear, with the exception of the freight, all costs and charges incurred in respect of the goods in the course of their transit by sea until their arrival at the port or destination, as well as unloading charges, including lighterage and wharfage charges, unless such costs and charges shall have been included in the freight or collected by the steamship company at the time the freight was paid.

Note: If the goods are sold "C. & F. landed", unloading costs, including lighterage and wharfage charges, are borne by the seller. (p. 38)

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10. See comment to "C. & F.", A. 11, *infra*.
11. 2-320(2)(d) requires the seller to obtain any other documents required to effect shipment or to comply with the contract. The cooperation requirements of 2-311 might also be relevant in some circumstances.

B. Buyer's Obligations

1. 2-320(4) provides that the buyer must make payment against tender of the required documents. 2-301 states the buyer's general obligation to accept and pay.
2. 2-509, as mentioned above, would have transferred responsibility for the risks, and hence the costs, to the buyer when the goods were duly delivered to the carrier. See also "C. & F.", A.5, *supra*.
2-321(1), dealing with C. & F. net landed weights terms, does not touch the matters in the note.

There is no reference in the Code to the buyer's obligation to receive the goods other than in 2-301. Here the obligation to accept documents has supplanted that obligation.

I. Incoterms

3. Bear all risks of the goods from the time when they shall have effectively passed the ship's rail at the port of shipment. (p. 38)
4. In case he may have reserved to himself a period within which to have the goods shipped and/or the right to choose the port of destination, and he fails to give instructions in time, bear the additional costs thereby incurred and all risks of the goods from the date of the expiration of the period fixed for shipment, provided always that the goods shall have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods. (p. 38)
5. Pay the costs and charges incurred in obtaining the certificate of origin and consular documents. (p. 40)
6. Pay all costs and charges incurred in obtaining the documents mentioned in Article A. 11 above. (p. 40)
7. Pay all customs duties as well as any other duties and taxes payable at the time of or by reason of the importation. (p. 40)
8. Procure and provide at his own risk and expense any import licence or permit or the like which he may require for the importation of the goods at destination. (p. 40)

II. Uniform Commercial Code

3. Refer to 2-509. See "C. & F.", comment B.2 above.
4. 2-509 seems wide enough to cover this shift of risk to the buyer.
On the question of appropriation to the contract, see "Ex-Ship", A.3, *infra*.
5. The Code does not have such a provision.
6. Because of 2-320(2)(d) the costs may fall on the seller, initially at least.
7. This seems to follow from the transfer of risk under 2-509.
8. The Code is silent, but this would seem to follow from the change of risk.

C.I.F.

A. The seller must . . .

[All items except item 5 may

A. Seller's Obligations

[All comments except for item

I. Incoterms

be found in the C. & F. section.]

5. Procure, at his own cost and in a transferable form, a policy of marine insurance against the risks of the carriage involved in the contract. The insurance shall be contracted with underwriters or insurance companies of good repute on FPA terms, and shall cover the CIF price plus ten per cent. The insurance shall be provided in the currency of the contract, if procurable. . . .

Unless otherwise agreed, the risks of carriage shall not include special risks that are covered in specific trades or against which the buyer may wish individual protection. Among the special risks that should be considered and agreed upon between the buyer and seller are theft, pilferage, leakage, breakage, chipping, sweat, contact with other cargoes and others peculiar to any trade.

When required by the buyer, the seller shall provide, at the buyer's expense, war risk insurance in the currency of the contract, if procurable. (pp. 42 and 44)

B. *The buyer must*

[All items may be found in the C. & F. section, except that rule 2 excepts in addition, marine insurance from the costs borne by the buyer, and further provides that "if war insurance is provided, it shall be at the expense of the buyer (see A.5)."]

II. Uniform Commercial Code

5 may be found in the C. & F. section.]

5. 2-320(2)(c) requires that the seller obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the unusual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern: but the seller may add to the price the amount of the premium for any such war risk insurance.

B. *Buyer's Obligations*

[Comments to all items may be found in the C. & F. section. 2-320 places the cost of war insurance on the buyer by allowing the sellers to add the premium to the price.]

EX-SHIP

I. Incoterms

A. *The seller must*

1. Supply the goods in conformity with the contract of sale, together with such evidence of conformity as may be required by the contract. (p. 56)
2. Place the goods effectively at the disposal of the buyer, at the time as provided in the contract, on board the vessel at the usual unloading point in the named port, in such a way as to enable them to be removed from the vessel by unloading equipment appropriate to the nature of the goods. (p. 56)
3. Bear all the risks and expense of the goods until such time as they shall have been effectively placed at the disposal of the buyer in accordance with article A.2, provided, however, that they have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods. (p. 56)
4. Provide at his own expense the customary packing of the goods, unless it is the custom of the trade to ship the goods unpacked. (p. 56)

II. Uniform Commercial Code

A. *Seller's Obligations*

1. See "F.O.B. Place of Shipment", A.1, *supra*.
2. It is not clear from the Code whether the buyer or seller has the burden of removing the goods from the ship. But 2-322(2)(b) does not pass the risk of loss to the buyer until the goods leave the ship's tackle or are otherwise properly unloaded. This seems to imply that the seller has the burden of moving the goods up to that point.
3. Under 2-322(2)(b) the risk remains with the seller "until the goods leave the ship's tackle or are otherwise properly unloaded".
The Code makes use of the concept of "identification" instead of "appropriation" of goods to the contract. As a practical matter it would seem necessary that goods be identified before they can be delivered to and placed on board a ship. However, 2-501(2) allows the seller to substitute other goods for those identified until the buyer is notified that the identification is final. Since a contract providing for delivery "ex-ship" is presumably a destination contract, [2-322(1)] such a substitution can probably be carried out until the goods have been unloaded.
4. See "F.O.B. Place of Shipment", A.5, *supra*.

I. Incoterms

5. Pay the costs of any checking operations (such as checking quality, measuring, weighing, counting) which shall be necessary for the purpose of placing the goods at the disposal of the buyer in accordance with Article A.2. (p. 56)
6. At his own expense, notify the buyer, without delay, of the expected date of arrival of the named vessel, and provide him in due time with the bill of lading or delivery order and/or any other documents which may be necessary to enable the buyer to take delivery of the goods. (p. 56)
7. Provide the buyer, at the latter's request and expense (see B.3), with the certificate of origin and the consular invoice. (p. 56)
8. Render the buyer, at the latter's request, risk and expense, every assistance in obtaining any documents, other than those mentioned in the previous articles, issued in the country of shipment and/or of origin and which the buyer may require for the importation of the goods into the country of destination (and where necessary, for their passage in transit through another country). (p. 58)

B. The buyer must

1. Take delivery of the goods as soon as they have been placed at his disposal in accordance with the provisions of article A.2, and pay the price as provided in the contract. (p. 58)

II. Uniform Commercial Code

5. The Code is silent on this point.
6. Since this is a destination contract 2-504 does not apply. But 2-503(1) requires the seller to give the buyer "any notification reasonably necessary to enable him to take delivery". 2-503 (5) further requires the seller to tender any required documents in correct form through banking channels.
7. The Code is silent on this.
8. The Code has no such provision, but the cooperation provisions of 2-311 may be relevant in some circumstances.

B. Buyer's Obligations

1. If documents are tendered, the buyer will probably pay against them. But there is no statutory requirement that the transaction take this form. Of course, 2-301 states the generalized obligation of the buyer to accept and pay. Williston, *Sales* (Rev. Ed. 1948) S. 280(g), cites

I. Incoterms

2. Bear all the risks and expenses of the goods from the time when they shall have been effectively placed at his disposal in accordance with article A.2, provided always that they have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods. (p. 58)
3. Bear all expenses and charges incurred by the seller in obtaining any of the documents referred to in articles A.7 and 8.
4. At his own risk and expense, procure all licences or similar documents which may be required for the purpose of unloading and/or importing the goods. (p. 58)
5. Bear all expenses and charges of customs duties and clearance, and all other duties and taxes payable at the time or by reason of the unloading and/or importing of the goods. (p. 58)

II. Uniform Commercial Code

Yangtze Insurance Association Ltd. v. Luknatee, [1918] A.C. 585 (P.C.) for the common law rule that where the term is ex-ship the buyer need only pay on delivery even if the contract provides for payment "against documents".

2. See "Ex-Ship" A.3, *supra*.
3. The Code is silent on this.
4. If 2-322(2)(b) is read as requiring the seller to unload, presumably these costs would fall on the seller; but the issue is unclear.
5. The Code is silent on this, but this is a likely distribution of responsibility.

APPENDIX 10

THE FRUSTRATED CONTRACTS ACT: PROPOSALS FOR REFORM*

(a) GENERAL

At the outset, it should be noted that two rather different principles have been adopted under *The Frustrated Contracts Act*¹ as bases of compensation. In the first place, the Act provides for compensation for benefits transferred prior to frustration on a restitutionary basis, i.e. to prevent unjust enrichment of the recipient. The extent of the relief offered will turn on the value of the benefit transferred. Secondly, some protection is afforded by the Act to the reliance interest of the parties. That is to say, the parties may receive compensation for expenses incurred in preparing to perform their obligations regardless of whether or not they result in the conferral of a benefit on the other party. Protection of the reliance interest is thus potentially wider in its scope than protection of the restitution interest and is motivated by a different impulse or purpose. Restitution is effected because it is unjust to permit the recipient to get something for nothing. Protection of the reliance interest is motivated by the feeling that it is unfair for some reason that the performer be saddled with the loss of his investment; that it ought to be allocated to or at least shared by the party who would ultimately benefit from the investment, the intended recipient of the product of the investment.² In my view, such a shift or apportionment would be clearly warranted where the parties entered the agreement on an informal understanding that such risk would be shared (though this is, of course, the easy case and presumably an agreement would be implied). And it might be argued that apportionment should take place unless the intended recipient of the benefit can demonstrate that his reasonable expectation was that he should be liable only for benefits actually transferred under the agreement.³

Against this background the interplay of reliance and restitutionary

*Reproduced, with author's minor editorial changes, from John D. McCamus, "The Doctrine of Frustration in the Law of Sales", Research Paper No. II.7.

¹R.S.O. 1970, c. 185.

²In the context of contractual damages the law protects the reliance interest, *semble*, in order to encourage reliance on the promises of others; see Fuller and Perdue (1936-37), 46 Yale L.J. 52, 373. The law of contract has not hesitated to pursue this policy against a party in breach, for he can assert no counter-vailing interest. But where, as here, no breach occurs, the intended recipient of the benefit can assert his reliance on the fact that he would pay only for performance. This may explain why the law of contract permits such reliance losses to lie where they fall. And it would appear that neither trade custom nor commonly accepted notions of fairness would upset this allocation of risk, in the absence of agreement to the contrary.

³In such a case we might be reluctant to prefer one party's expectations over the other, but nonetheless grant restitutionary relief for benefits conferred since the policy of preventing unjust enrichment places a stronger claim on our sense of justice. See Fuller and Perdue, *supra* note 2.

protection under the Act may be considered.

(b) MAIN PROVISIONS OF THE ACT

The Act overrules the principles of *Chandler v. Webster*⁴ by providing that obligations to pay accruing before frustration but not yet performed are discharged⁵ and by permitting recovery of money paid⁶ subject to the proviso that the Court is given a discretion to hold back all or part of the monies paid and grant recovery of sums payable where the payee has incurred expenses in connection with performance.⁷ And secondly, the Act confers a power on the Court to award compensation in whole or in part for the value of benefits conferred.⁸

In providing for the restitution of benefits conferred, the legislation stands on firm ground. Indeed, it may amount simply to a statutory statement of the principles of *Deglman v. Guaranty Trust*.⁹ This being so, it seems that the granting of a *discretionary* power to order restitution is unnecessarily cautious, and the Act could be improved by giving a clearer statement of the basis on which relief is to be granted. This could be achieved by adopting the following provisions of the *Restatement of Contracts*:¹⁰

Section 468. *Rights of Restitution*

(1) Except where a contract clearly provides otherwise, a party thereto who has rendered part performance for which there is no defined return performance fixed by the contract, and who is discharged from the duty of further performance by impossibility of rendering it, can get judgment for the value of the part performance rendered, unless it can be and is returned to him in specie within a reasonable time.

(2) Except where a contract clearly provides otherwise, a party thereto who has rendered performance for which the other party is excused by impossibility from rendering the agreed exchange, can get judgment for the value of what he has rendered, less the value of what he has received, unless what he has rendered can be and is returned to him in specie within a reasonable time.

(3) The value of performance within the meaning of Subsections (1, 2) is the benefit derived from the performance in advancing the object of the contract, not exceeding, however, a ratable portion of the contract price.

⁴See chapter 15 of this Report, note 71, in which the principles are briefly stated.

⁵S. 3(1)(b).

⁶S. 3(1)(a).

⁷S. 3(2).

⁸S. 3(3).

⁹[1954] S.C.R. 725.

¹⁰American Law Institute, *Restatement of the Law of Contracts* (1932).

Paragraph 3 can be supported on the basis that frustration should not work a profit to the party conferring the benefit as the recipient is equally innocent of wrongdoing.¹¹

The provisions of the Act protecting the reliance interest are, however, less secure. It is to be noted that reliance expenditures are compensable only insofar as prepayment of the other party is required under the agreement.¹² The explanation for this limitation, presumably, is that "in stipulating for prepayment the payee intends to protect himself against loss . . . (caused) by frustration of the contract".¹³ However, prepayments may be extracted for a variety of reasons, e.g. as an earnest, as pre-estimated damages, to ensure against payer's insolvency, to put the payee in funds, etc., and accordingly, this limitation on recovery may in many cases be wholly unrelated to the basis for compensation.

What must be considered then is whether or not reliance compensation is in general warranted. If so, the theoretical footing of such compensation should be articulated and embodied in the provisions of the Act. Goff and Jones have suggested that the denial of compensation is more in accord with "business ethics and commercial expectations" and this appears to be the position in American Law.¹⁴ A strong argument can be made to the contrary, however, especially in cases of the kind illustrated by *Appleby v. Myers*.¹⁵ There the plaintiff had commenced to erect machinery on the defendant's premises in accord with their agreement, when the premises were destroyed by fire. A strict reading of restitutionary principles would deprive the plaintiff of compensation since the defendant has not been unjustly enriched, and this is indeed the thrust of some American and Canadian authority.¹⁶ The British Columbia Law Reform Commission Report on the Need for Frustrated Contracts Legislation in British Columbia¹⁷ suggests, however, that on these facts, the loss should be apportioned equally on the theory that natural justice does not dictate which of the two innocent parties should bear the loss. Yet surely all cases of reliance losses resulting from frustration exhibit the characteristic of imposing a heavy burden on one of two innocent parties. On this basis apportionment of reliance losses should be universal and, subject to cer-

¹¹Acknowledgment of the merit of these provisions is made by Goff and Jones, *The Law of Restitution* (1966), at p. 333. See also, the Law Reform Commission of British Columbia, *Report on the Need for Frustrated Contracts Legislation in British Columbia* (1971), at pp. 31-32 (hereinafter referred to as the B.C. Report).

¹²S. 3(2).

¹³Goff and Jones, *supra* note 11, at p. 332.

¹⁴*Ibid.* at p. 333.

¹⁵(1867) L.R. 2 C.P. 65.

¹⁶Keener, W. A., *The Law of Quasi-Contracts* (1893), pp. 253-258. Cf. the views of Woodward relied on by Goff and Jones, *supra* note 11, at p. 335 to the effect that each act in performance should be counted a benefit and hence recovery granted on these facts. And see *Parsons Bros. Ltd. v. Shea* (1965) 53 D.L.R. (2d) 86 applying *Appleby* in interpreting the Newfoundland frustrated contracts legislation.

¹⁷*Supra*, note 11.

tain limitations, this appears to be the recommendation of the B.C. Report.¹⁸

Although apportionment thus seems presumptively fair, it must not be ignored that the circumstances of the agreement and the frustrating event may suggest that the risk be exclusively borne by either party. Trade custom or tacit understandings may indicate that the performer should bear the risk of his reliance losses.¹⁹ It is also possible, though less likely perhaps, that the parties would expect the non-performer to cover the loss. *Appleby v. Myers* may be a case in point. Many commentators have argued that the plaintiff should have recovered in that case because the conduct of the plaintiff did confer a "benefit" on the defendant.²⁰ In my view, the reluctance to deprive the plaintiff of recovery in *Appleby* is better explained on the basis that on such facts it would seem reasonable for the defendant to assume the risk of loss by fire of chattels on his own premises, i.e. the parties might have reasonably assumed that the goods would be brought under the defendant's insurance cover.²¹ In such cases, indemnification may be justified. In any event, I would argue that the sterile debate as to whether the defendant truly received a benefit should be abandoned and indemnification or apportionment should be placed on the basis of any reasonable understanding the parties might have as to allocation of the risk.

The discernment of such understandings will not invariably be an easy task. With respect to prepayments, for example, as Goff and Jones suggest, the normal presumption may be that the payer is not the insurer of the payee. Nonetheless, if the facts in the particular case show what amounts to a joint venture (though in form a sale) or where, as in *Appleby*, the facts might be taken to indicate reasonable expectations that the risk of loss of the type which occurs has shifted,²² this presumption

¹⁸The B.C. Report recommends (at p. 32) that apportionment be made of losses reasonably incurred in attempting performance and would accomplish this by determining "benefit" to mean "something done in the fulfilment of contractual obligations whether or not the person for whose benefit it was done received the benefit". *Ibid.*, p. 74. And see the *Frustrated Contracts Act*, S.B.C., 1973, c. 37, sec. 5(4) (implementing this recommendation).

¹⁹The B.C. Report recommends, at p. 34, a limitation on the right to apportionment to reflect this possibility and the new B.C. Act so provides. See sec. 6. The B.C. Report suggests, at pp. 32-3, that where the parties may reasonably be taken to have assumed that this particular risk falls on the party whose performance fails, the doctrine of frustration might not apply at all. On the contrary, however, application of the doctrine might be appropriate so as to deprive the recipient of his expectancy, his action for damages. Whether the performing party must be saddled with all of the reliance losses is a separate question from that of full enforceability of the agreement.

²⁰See, e.g., the views of Woodward, Goff and Jones, referred to *supra* at footnote 16.

²¹*Cf.* R. Posner, *Economic Analysis of Law* (1972), at pp. 49-50 (suggesting that the risk should fall on the party who can more efficiently insure against it).

²²Neither the B.C. Report nor the implementing statute appear to admit of the possibility of allocating the entire loss to the non-performing party.

may be unsettled. The validity of this or any other assumption concerning risk allocation may vary from one commercial setting to the next and from one pair of contractors to another. A careful shifting of evidence relating to trade custom, past practice of the parties and the circumstances of the agreement would be needed in most cases. Despite the difficulty of the task, however, such an exercise appears more likely to yield results which would be considered equitable by the parties than those offered by the present rules. Should a court be unable to determine a basis for risk allocation rooted in the consensus of the parties, equal apportionment of the loss could fairly be awarded.

In sum, this cursory review²³ of the main features of the Act suggests that it might usefully be amended to permit indemnification or allocation of reliance losses in accord with the foregoing analysis.²⁴

²³The foregoing analysis is not exhaustive of the problems under the Act; accordingly a separate project dealing expressly with frustrated contracts legislation is recommended.

²⁴Finally, it may be noted that the *Uniform Commercial Code* does not expressly provide for the protection of the reliance and restitution interests of the parties upon frustration. The draftsman merely suggests in Comment 6 to s. 2-615 that "adjustment under the various provisions of this article is necessary, especially the sections on good faith (etc.,) . . . and on the general policy of this Act to use equitable principles in furtherance of commercial understanding and good faith". It is submitted that clearer legislative guidance than this should be given to the parties and to the court with respect to these problems.





